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Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

TIG INSURANCE COMPANY,

Petitioner,

v.

SECURITY INSURANCE COMPANY OF HARTFORD; TRUSTMARK INSURANCE COMPANY,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a general state choice-of-law clause in a contract with an arbitration agreement that is subject to the Federal Arbitration Act renders inapplicable federal arbitration rules and instead incorporates state arbitration rules.

LIST OF PARTIES AND AFFILIATES

The parties are listed on the cover of this Petition. Pursuant to Rule 29.6 Petitioner TIG Insurance Company is a wholly owned subsidiary of Fairfax Holdings Limited, which is a publicly traded company.

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SECURITY INSURANCE COMPANY OF HARTFORD; TRUSTMARK INSURANCE COMPANY,

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner TIG Insurance Company ("TIG") respectfully requests that this Court grant its petition for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals is published at 360 F.3d 322 (2d Cir. 2004) and appears in the Appendix to this Petition ("Pet. App.") at 1a-12a. The court of appeals' order denying the petition for rehearing en banc is unpublished and appears at Pet. App. 31a-32a. The district court's opinion is published at 283 F. Supp. 2d 602 (D. Conn. 2003) and appears at Pet. App. 13a-28a.

JURISDICTION

The district court had jurisdiction based upon federal diversity under 28 U.S.C. § 1332(a). The court of appeals had appellate jurisdiction to review the district court's entry of an order staying the arbitration proceedings pursuant to 9 U.S.C. § 16(a)(2). The court of appeals entered judgment on March 2, 2004, and denied a timely petition for rehearing and rehearing en banc on May 20, 2004. This Court has jurisdiction over this petition under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, governs written agreements to arbitrate in contracts involving interstate commerce. Section 2 of the FAA is set forth at Pet. App. 33a.

California Civil Code of Procedure § 1281.2 is reprinted in its entirety at Pet. App. 33a-34a. Subsection (c) provides, in relevant part:

> If the court determines that a party to the arbitration is also a party to litigation in a pending court action or special proceeding with a third party as set forth under subdivision (c) herein, the court (1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or special proceeding.

Id. at 34a.

STATEMENT OF THE CASE

The decision below presents this Court with a recurring legal issue that is critical to the proper application of the FAA to countless commercial contracts throughout the country. Review by this Court of the decision and judgment below is necessary because they conflict directly and irreconcilably with the decisions of other federal courts of appeals and with decisions of this Court. See Sup. Ct. R. 10(a)-(c).

A. This case presents the issue of what impact a general choice-of-law provision in a contract with an arbitration clause has on the application of the pro-arbitration rules and policies embodied in the FAA. A deep and persistent conflict among the courts of appeals has arisen on this issue in the wake of this Court's decisions in *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Standford Junior University*, 489 U.S. 468 (1989) and *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995).

The Second Circuit, in the decision below, and the D.C. Circuit both have relied upon *Volt* to hold that a general choice-of-law provision should be read to adopt state-arbitration rules rather than the otherwise applicable rules set forth in the FAA. Pet. App. 4a; accord *Ekstrom* v. *Value Health, Inc.*, 68 F.3d 1391, 1393 (D.C. Cir. 1995). In direct contrast, the Third Circuit, and the First, Fourth, Fifth, Sixth, Eighth, Ninth and Tenth Circuits, have relied upon this Court's decision in *Mastrobuono* to hold that a general choice-of-law provision does not incorporate state arbitration rules and oust application of the FAA. *E.g.*, *Roadway Package Sys., Inc.* v. *Kayser*, 257 F.3d 287, 296 (3d Cir. 2001) (citing cases); *Wolsey, Ltd.* v. *Foodmaker, Inc.*, 144 F.3d 1205, 1213 (9th Cir. 1998).[1] Numerous courts have

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[1] *See also PaineWebber Inc.* v. *Elahi*, 87 F.3d 589, 594 (1st Cir. 1996); *Porter Hayden Co.* v. *Century Indem. Co.*, 136 F.3d 380, 382-83 (4th Cir. 1998); *Action Indus., Inc.* v. *United States Fid. & Guar. Co.*, 358 F.3d 337, 343 (5th Cir. 2004); *Ferro Corp.* v. *Garrison Indus., Inc.*, 142 F.3d

highlighted the importance of this issue, and the court of appeals and district court below added their voices to that chorus, explaining that this issue has been a "fertile source of debate" that has resulted in "state and federal courts arriving at conclusions too varied to mention," Pet. App. 18a, with regard to "a recurring and troubling theme in many commercial contracts," *id.* at 1a.

B. Under the view adopted by the court of appeals, the practical impact of the FAA would be severely and improperly curtailed. As courts adopting the majority position have explained, (1) most commercial contracts with arbitration agreements contain general choice-of-law provisions, and (2) under the minority view, these choice-of-law provisions would be read to reincorporate state arbitration standards that the FAA was enacted to displace. Such a construction cannot be supported as a matter of the parties' intent because a general choice-of-law provision is not typically intended to address the interplay between state and federal law. Nor can the minority approach be reconciled with this Court's repeated admonition that "'any doubts'" concerning "'the construction of contract language'" "'should be resolved in favor of arbitration.'" *Mastrobuono*, 514 U.S. at 62 n.8 (quoting *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)); *accord Volt*, 489 U.S. at 476 (in interpreting an agreement to arbitrate, "due regard must be given to the federal policy favoring arbitration").

Based upon the rationale of the court below, the FAA would apply only when the parties to contracts containing general choice-of-law provisions affirmatively excluded application of state arbitration rules and expressly stated their

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926, 937-38 (6th Cir. 1998); *UHC Mgmt. Co.* v. *Computer Scis. Corp.*, 148 F.3d 992, 995-97 (8th Cir. 1998); *Sovak* v. *Chugai Pharm. Co.*, 280 F.3d 1266, 1269-70 (9th Cir.), *opinion amended on denial of reh'g*, 289 F.3d 615 (9th Cir.), *cert. denied*, 537 U.S. 825 (2002); *Kelley* v. *Michaels*, 59 F.3d 1050, 1054-55 (10th Cir. 1995).

intention to be bound by the FAA. Such a holding runs contrary to this Court's conclusion that Congress intended the FAA to apply broadly to the full extent of its power under the Commerce Clause even when there is no showing that the parties contemplated that the FAA would govern their agreement to arbitrate. *E.g.*, *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 272 (1995).

C. Finally, any doubt as to whether a general choice-of-law provision renders federal arbitration law inapplicable should be resolved, at a minimum, with appropriate deference to the arbitral panel's determinations. In *Mastrobuono*, this Court noted that in cases involving a "*federal* court's interpretation" of a contract subject to the FAA, the "only decisionmaker arguably entitled to deference" is "the arbitrator." 514 U.S. at 60 n.4 (distinguishing *Volt*, 489 U.S. at 474). Here, respondent sought and obtained a stay from the federal court only after the arbitral panel expressly rejected respondent's earlier request for a stay of arbitration.

Appropriate deference to the views of the arbitral panel follows from this Court's decisions explaining that arbitrators, rather than courts, presumptively must resolve procedural issues arising from the arbitration. Thus, in *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), this Court explained that issues that arise out of an arbitration, such as contract interpretation, presumptively should be resolved by the arbitrator. *Id.* at 83-85 ("'"procedural" questions which grow out of the dispute and bear on its final disposition' are presumptively *not* for the judge, but for an arbitrator, to decide."). [2] Thereafter, in *Green Tree Financial Corp.* v. *Bazzle*, a plurality of this Court emphasized the importance of this issue when it vacated a state-court decision and ordered,

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[2] *See also PacifiCare Health Sys., Inc.* v. *Book*, 123 S. Ct. 1531, 1535-36 (2003); *Green Tree Fin. Corp.* v. *Bazzle*, 123 S. Ct. 2402, 2408 (2003) (Breyer, J., plurality op.); *Vimar Seguros Y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 541 (1995).

sua sponte, that the arbitrator (rather than the court) interpret the parties' agreement. 123 S. Ct. 2402, 2408 (2003).

Here, the court of appeals engaged in contract construction to determine whether the parties had incorporated state arbitration procedures in their contract. This, however, was an issue for the arbitral panel. Indeed, it was only *after* the arbitral panel denied respondent Security's request for a stay of the arbitration proceedings that Security made the same request of the district court. The court of appeals, however, affirmed the district court's conclusion that the arbitral panel's denial of the request for a stay had no bearing on the resolution of the parties' dispute regarding the meaning of the arbitration agreement. Pet. App. 11a-12a. That ruling contravenes rulings by this Court and other courts of appeals.

Background

A. The Reinsurance Agreement. This case arises from an agreement ("Reinsurance Agreement") between TIG and Security Insurance Company of Hartford ("Security"), whereby Security agreed to indemnify TIG for a portion of TIG's liability arising out of certain workers compensation policies of insurance or reinsurance. The agreement was negotiated on Security's behalf by WEB Management LLC ("WEB"). The "territorial scope" of the Reinsurance Agreement is "worldwide." The Reinsurance Agreement contains an arbitration clause, which is included in the Appendix, hereto. Pet. App. 35a-36a. Given its broad territorial scope, and the transmission of premiums, accounts and claim payments between different states, there is no dispute that the Reinsurance Agreement "involve[s] commerce" within the meaning of Section 2 of the FAA.

The arbitration clause does not reference or incorporate state-law arbitration rules. Instead, it provides that "[a]s a condition precedent to any right of action hereunder, *any irreconcilable dispute between the parties to this Agreement* shall be submitted for decision to a board of arbitration

composed of two arbitrators and an umpire meeting [at] a place to be agreed by the board." Pet. App. 35a (emphasis added). The arbitration agreement sets forth the mechanism for the initiation of arbitration and explains that the arbitral board must be composed of "disinterested officials of insurance or reinsurance companies, or Underwriters at Lloyd's, London." *Id.* Timing is addressed with great care. The arbitration clause establishes a default briefing schedule and provides that, absent the "consent" of the parties, the arbitral board is obligated to render "its decision within 60 days following the termination of the hearings." *Id.* at 36a. At those hearings, "evidence may be introduced without following [the] strict rules of evidence but . . . cross-examination and rebuttal shall be allowed." *Id.* In reaching its decision, the arbitration clause provides that the "board shall make its decision with regard to the custom and usage of the insurance and reinsurance business." *Id.*

The Reinsurance Agreement also has a "Governing Law" clause that states: "This Agreement shall be governed by and construed according to the laws of the state of California, except as to rules regarding credit for reinsurance in which case the rules of all applicable states shall pertain thereto. Notwithstanding the foregoing, in the event of a conflict between any provision of this Agreement and the laws of the domiciliary state of any company intended to be reinsured hereunder, that domiciliary state's laws shall prevail."

Security also entered into a separate contract ("Retrocession Agreement") with Trustmark Insurance Company ("Trustmark") whereby Trustmark agreed to reinsure Security for 100% of the risk (subject to certain immaterial exclusions) that Security assumed from TIG under the Reinsurance Agreement. Pet. App. 2a. The Retrocession Agreement contains no arbitration clause. *Id.* WEB acted as agent for Security and Trustmark with regard to the Retrocession Agreement.

B. The Dispute. In November 2001, Trustmark informed Security that it believed that TIG had defrauded WEB in connection with the Reinsurance Agreement and suggested that Security rescind the Reinsurance Agreement. Security requested proof of the alleged fraud. Instead of providing proof, on November 26, 2001, Trustmark informed Security it was rescinding the Retrocession Agreement. The next day, Security filed a complaint against Trustmark in federal district court in Connecticut ("Federal Litigation"), seeking a declaration that Trustmark was not entitled to rescind the Retrocession Agreement. On May 3, 2002, Trustmark filed a third-party complaint against TIG, arguing that TIG defrauded WEB and thereby fraudulently induced Trustmark to enter into the Retrocession Agreement.

C. The Arbitration. On April 29, 2002, Security suspended further payments to TIG based on Trustmark's allegations of fraud. On June 27, 2002, TIG invoked the arbitration clause in the Reinsurance Agreement. After TIG and Security had chosen the arbitrators and umpire, and submitted positional papers to the arbitral panel, the arbitral panel adopted a briefing and hearing schedule that provided for an evidentiary hearing in New York to begin on August 11, 2003.

On May 5, 2003, Security filed a motion before the arbitration panel to stay the arbitration pending the outcome of the Federal Litigation. Security argued that a stay was appropriate because the Federal Litigation would "resolve all the issues pending in this arbitration." Motion at 1, 9. TIG opposed the stay because it was contrary to the terms of the Reinsurance Agreement and the Federal Arbitration Act. TIG explained that the motion, if granted, would "deprive TIG of its contractual right to arbitrate." Opposition to Stay at 5. Specifically, TIG pointed out that, under the arbitration agreement, disputes must be resolved by a "panel of 'officials of insurance or reinsurance companies'" applying the "'custom and usage of the insurance and reinsurance

business'" rather than a court or jury of laypersons applying "strict legal principles under state law in a federal trial court." *Id.* at 6-7 (quoting arbitration agreement). Finally, TIG explained that a stay of the arbitration would deprive TIG of a speedy and efficient resolution of its disputes with Security and that such speed and efficiency are among the principal reasons why these parties choose arbitration as their forum for dispute resolution. *Id.* at 11-12.

In reply, Security (1) acknowledged that "to date" it had not identified "any ground that it believes provides a valid basis to rescind the reinsurance agreement," and (2) asserted that it was "frivolous for Trustmark to attempt to rescind the retrocession agreement with Security based on allegations of wrongdoing directed at TIG." Reply at 6 & n.5. Security provided no response to TIG's showing that the FAA precluded Security's effort to rewrite the arbitration clause and never suggested that the arbitral panel was bound by California arbitration rules. On May 26, 2003, the arbitral panel rejected Security's request for a stay. Pet. App. 29a-30a. As a result, the hearing on the merits before the arbitral panel was scheduled to commence on August 11, 2003.

D. The District Court's Decision. On June 3, 2003, Security filed another motion for a stay of the arbitration, but this time with the federal district court in Connecticut. For the first time, Security argued that a stay was warranted because the arbitration provision contained in the Reinsurance Agreement was not subject to the limitations set forth in the FAA, but instead adopted California Civil Procedure Code § 1281.2(c), which, among other things, authorized a stay of the arbitration. TIG opposed the motion because "general choice-of-law provisions like the one here are insufficient as a matter of law to incorporate state arbitration procedural rules." Opposition to Stay at 2.

The district court issued a stay order that prevented the arbitration from going forward. It first highlighted that the question of a stay was not an issue of arbitrability, but instead

involved "the 'allocation of power between alternative tribunals.'" Pet. App. 21a n.5. It noted that "the import" of this Court's "*Mastrobuono* and *Volt* decisions is a fertile source of debate, with state and federal courts arriving at conclusions far too varied to mention here." *Id.* at 18a (footnote omitted). The court nevertheless highlighted that the Third Circuit and Ninth Circuit, "[i]n an effort to resolve conflicting interpretations, . . . have adopted a presumption 'that a generic choice-of-law clause, standing alone, is insufficient to support a finding that contracting parties intended to opt out of the FAA's default standards.'" *Id.* (citing *Roadway*, 257 F.3d at 296, and *Sovak*, 280 F.3d at 1269). The district court, however, expressly rejected that approach and instead adopted the view that, under the FAA, state law alone "provides the tools by which the intent of the parties is ascertained." *Id.* at 21a.

The district court also rejected TIG's reliance upon the arbitral panel's denial of Security's motion for stay. The court concluded that the arbitral panel's denial of a stay had no bearing on a court's consideration of that issue. Pet. App. 27a-28a. TIG appealed the order staying arbitration under 9 U.S.C. § 16(a)(2).

E. The Court of Appeals' Decision. The court of appeals affirmed. Like the district court, the court of appeals also recognized that this "case presents a recurring and troubling theme in many commercial contracts: to what extent must a court—confronted with a choice-of-law provision in a contract—incorporate the designated state's statutory and common law governing arbitrations even when doing so seems contrary to the Federal Arbitration Act ('FAA')?" Pet. App. 1a.

After reviewing this Court's decisions in *Volt* and *Mastrobuono*, the court of appeals disagreed with the Ninth Circuit's conclusion that a general choice-of-law provision will not incorporate California's state-law arbitration rules, including California Civil Procedure Code § 1281.2(c). Pet.

App. 9a n.4 (rejecting holding in *Wolsey, Ltd.* v. *Foodmaker, Inc.*, 144 F.3d 1205, 1212 (9th Cir. 1998)). The court below rejected *Wolsey* because "the Ninth Circuit relied on its interpretation of *Mastrobuono* to conclude that the choice-of-law provision did not incorporate section 1281.2(c)(4)." *Id.* Instead, the court of appeals believed that the "federal policy favoring arbitration" was inapplicable to its determination of how "California law interprets the choice-of-law provision utilized in this contract." *Id.* at 9a. Specifically, the court ruled that while the "federal policy favoring arbitration requires a specific reference to the restrictions on the parties' substantive rights or the arbitrator's powers to establish that the parties clearly intended to limit their rights under the FAA," *id.* at 8a-9a, this "federal policy favoring arbitration" does not apply in this case because "section 1281.2(c)(4) is a 'state procedural rule,'" *id.* at 9a.

Although entry of a stay would prevent the arbitral panel from issuing any decision, the court of appeals concluded that the California arbitration statute authorizing that interference with the arbitral process "does not limit . . . the arbitrator's power to resolve the dispute," Pet. App. 9a, or address the "'allocation of powers between the court and the arbitrator.'" *Id.* at 8a; see also *id.* at 7a. The court of appeals held that the "choice-of-law" clause "incorporate[d] the state's procedural rules for arbitration," *id.* at 11a, and ruled that "[i]f the parties intended for only California substantive law to govern, they could easily have made their intentions clearer with a second exclusion for California's arbitration rules," *id.*

TIG sought rehearing and rehearing en banc because (1) the court of appeals' holding about the impact of a general conflict-of-law clause was in direct conflict with decisions of a host of other courts of appeals, and (2) under *Howsam* and *Green Tree*, the proper interpretation of an agreement to arbitrate is a question for the arbitrator and not a court. On May 20, 2004, the court of appeals denied the petition for rehearing and rehearing en banc. Pet. App. 31a.

REASONS FOR GRANTING THE PETITION

This case implicates significant legal issues concerning the proper scope and application of the Federal Arbitration Act ("FAA"). If left undisturbed, the decision below threatens to undermine proper application of the FAA in a broad array of commercial arrangements where parties have agreed to arbitrate disputes but also have included in their contracts a general choice-of-law provision.

In light of this Court's decisions in *Volt* and *Mastrobuono*, a deep and mature conflict has arisen with regard to the impact of general choice-of-law provisions in commercial contracts that contain written agreements to arbitrate. The First, Third, Fourth, Fifth, Sixth, Eighth, Ninth and Tenth Circuits have relied upon this Court's decision in *Mastrobuono* to hold that the inclusion of a general choice-of-law provision in a contract containing an agreement to arbitrate will not oust application of the FAA in favor of state-law arbitration standards. *E.g.*, *Roadway Package Sys., Inc.* v. *Kayser*, 257 F.3d 287, 300 (3d Cir. 2001) (citing cases); *Wolsey Ltd.* v. *Foodmaker, Inc.*, 144 F.3d 1205, 1212 (9th Cir. 1998); see *supra* note 1 (setting forth cases adopting majority rule). In direct conflict, the Second Circuit (in the decision below) and the D.C. Circuit have held that general choice-of-law provisions should be interpreted to incorporate state-law arbitration rules at the expense of the FAA's protections. Pet. App. 7a-10a; *Ekstrom* v. *Value Health, Inc.*, 68 F.3d 1391, 1393 (D.C. Cir. 1995).

This case provides an ideal vehicle for resolving this conflict because, if the court below had adopted the majority approach, then California arbitration rules would not have been incorporated, and the FAA would have prevented the federal courts from interfering with the conduct of the arbitration. See *Roadway*, 257 F.3d at 300. Indeed, when presented with this same issue, the Ninth Circuit held that a general choice-of-law provision does not effectuate a

wholesale abandonment of the FAA in favor of California arbitration rules. *Wolsey*, 144 F.3d at 1212-13; see also *Sovak* v. *Chugai Pharm. Co.*, 280 F.3d 1266, 1269-70 (9th Cir. 2002) ("the strong default presumption is that the FAA, not state law, supplies the rules for arbitration"). The court below acknowledged and expressly rejected *Wolsey* based upon its disagreement with the Ninth Circuit's "interpretation of *Mastrobuono*." Pet. App. 9a.

Federal courts thus have adopted conflicting standards such that similarly situated litigants will be treated differently based solely upon where their lawsuits are filed. Further, there can be no question that proper application of the FAA presents an important and recurring issue of federal law. As both the district court and court of appeals recognized, the impact of a choice-of-law provision on the application of the FAA is "a fertile source of debate" and "a recurring and troubling theme" that has resulted in "decisions too varied to mention." Pet. App. 18a, 1a. Review by this Court is thus necessary to ensure the uniform application of the FAA.

Even if the issue of contract interpretation—*i.e.*, whether the parties incorporated California arbitration rules into their agreement to arbitrate—presented a close question, there can be no doubt that it should have be resolved, at a minimum, with appropriate deference to the arbitral panel's refusal to grant a stay of arbitration. See *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 60 n.4 (1995) (explaining that "arbitrator" is "the only decisionmaker arguably entitled to deference"). In *Howsam* v. *Dean Witter Reynolds, Inc.*, this Court ruled that procedural issues arising out of an arbitration presumptively should be resolved by arbitrators rather than by courts. 537 U.S. 79, 84 (2002). Similarly, in *Green Tree Financial Corp.* v. *Bazzle*, a plurality of this Court, *sua sponte*, held that the issue whether an agreement permitted class arbitration was a disputed issue of contract interpretation that was for the arbitrator to decide. 123 S. Ct. 2402, 2407-08 (2003).

In failing, at a minimum, to afford any weight or deference to the arbitral panel's prior rejection of respondent Security's request for a stay, the decisions below conflict directly with this Court's decisions holding that resolution of procedural questions arising from an arbitration is presumptively the province of arbitrators, not courts. See *Howsam*, 537 U.S. at 84; *Green Tree*, 123 S. Ct. at 2407-08; *PacifiCare Health Sys., Inc.* v. *Book*, 123 S. Ct. 1531, 1535-36 (2003); *Vimar Seguros Y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 541 (1995). Indeed, this case involves a particularly egregious example of overreaching because it is only after the arbitral panel expressly declined to grant a stay, that respondent sought (and obtained) from a court the same relief that the arbitral panel had denied.

THE DECISION BELOW IMPLICATES A DEEP AND PERSISTENT CONFLICT AMONG THE COURTS OF APPEALS AND CONFLICTS WITH DECISIONS OF THIS COURT ON THE ISSUE WHETHER A GENERAL CHOICE-OF-LAW PROVISION INCORPORATES STATE-LAW ARBITRATION RULES.

The decision below warrants further review by this Court because it implicates a deep conflict among the courts of appeals on the question whether a general choice-of-law provision displaces the pro-arbitration protections inherent in the FAA. In rejecting the majority approach, the court below adopted a rule that improperly constricts the scope of the FAA, fails to give effect to the FAA's policy in favor of arbitration, and creates an unnecessarily complex legal regime that forsakes the benefits of arbitration and undermines Congress' efforts to promote resort to arbitration as a quick and efficient means of dispute resolution. Finally, even if this were a close question, the panel below, at a minimum, should have deferred to the arbitral panel's refusal to grant an identical request for a stay of arbitration.

A. The Decision Below Implicates A Mature Conflict On The Issue Whether Federal Arbitration Law Is Rendered Inapplicable By A General State Choice-of-Law Provision.

1. The majority of circuits—including the First, Third, Fourth, Fifth, Sixth, Eighth, and Tenth Circuits—has held that a general choice-of-law clause does not displace application of the FAA in favor of state arbitration rules.

The leading case in the majority is *Roadway*, 257 F.3d at 297 (Becker, C.J.), in which the Third Circuit interpreted a general choice-of-law clause that provided that the contract "'shall be governed by and construed in accordance with the laws of the Commonwealth of Pennsylvania.'" *Id.* at 290. The court concluded that the issue of "contract construction" of an arbitration agreement to which the FAA applied "is *not* governed by state law—it is governed by federal law," *id.* at 294, and held that "a generic choice-of-law clause, standing alone, is insufficient to support a finding that contracting parties intended to opt out of the FAA's default standards," *id.* at 296. The Third Circuit acknowledged that decisions from other circuits were "to the contrary," but adopted the majority standard because it was consistent with "case law from both the Supreme Court and six of our sister circuits." *Id.* at 295-96 & n.4 (citing cases); *id.* at 298 & n.7 (same).

Noting that general choice-of-law clauses were "ubiquitous" in commercial agreements, *id.* at 293, the *Roadway* court explained that such clauses play a vital role in determining which state's contractual law will apply, *id.*, but "speak to an issue wholly distinct" from the issue whether federal law or state law rules will govern arbitration, *id.* at 294. The Third Circuit reasoned that "the presence of a generic choice-of-law clause tells us little (if anything) about whether contracting parties intended to opt out of the FAA's

default standards and incorporate ones borrowed from state law." *Id.* at 296.[3]

Accordingly, the Third Circuit adopted, as a matter of federal law, a default rule designed to (1) "minimize the frequency with which parties will be found to have opted out of the FAA's default regime when they did not intend to do so"; (2) "be easy for arbitrators and district courts to deter[m]ine whether parties have opted out of federal standards"; and (3) "preserve and facilitate the ability of parties to contract around the default federal standards," *id.* at 296-97. The Third Circuit also rejected the view that "contracts containing generic choice-of-law clauses and arbitration clauses should be construed as incorporating all state arbitration rules that are 'procedural' in nature and 'substantive' state arbitration rules that do not 'conflict' with the FAA," *id.* at 298, because such a rule "would unduly complicate the law" and "would not . . . effectuat[e] the intent of most contracting parties," *id.* at 299.

Consistent with *Roadway*, the Ninth Circuit, applying federal law, also has held that under the FAA "a general choice-of-law clause within an arbitration provision does not trump the presumption that the FAA supplies the rules for arbitration." *Sovak*, 280 F.3d at 1270. Rather, the *Sovak* court explained that the Ninth Circuit "will interpret the choice-of-law clause as simply supplying state substantive, decisional law, and not state law rules for arbitration." *Id.*

The decision in *Sovak* reaffirmed the Ninth Circuit's prior holding in *Wolsey, Ltd.* v. *Foodmaker, Inc.*, 144 F.3d 1205 (9th Cir. 1998). An examination of *Wolsey* underscores the importance of the conflict among the courts of appeals. In *Wolsey*, the Ninth Circuit relied upon *Mastrobuono* (and

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[3] *Roadway* showed that choice-of-law clauses speak to the "horizontal question" "whether the laws of State X or State Y supply the relevant rule of decision," not the "vertical" issue "whether the rule of decision is supplied by the laws of State X or by federal law." 257 F.3d at 293-94.

rejected reliance upon *Volt*) to hold that a choice-of-law clause that provided the agreement "'shall be interpreted and construed under the laws of the State of California,'" *id.* at 1209, did "not incorporate" Section 1281.2(c) of the California Civil Procedure Code—*i.e.*, the very same California statute at issue in this case.[4]

To the same effect is *Ferro Corp.* v. *Garrison Industries, Inc.*, 142 F.3d 926 (6th Cir. 1998). There, the Sixth Circuit reversed a district court's ruling that "by inserting the choice-of-law clause into their arbitration agreement, the parties expressly contracted to be bound by the laws of Ohio, thus precluding application of the FAA." *Id.* at 933. The Sixth Circuit expressly rejected the district court's reliance upon *Volt*, explaining that *Volt* was "distinguishable," and that the district court "was bound to follow the Supreme Court's more recent decision in *Mastrobuono*." *Id.* Applying *Mastrobuono* (and other federal court decisions), the Sixth Circuit held that the choice-of-law provision gave "no indication that the parties intended to incorporate Ohio law" to govern the scope of the agreement to arbitrate. *Id.* at 937.[5]

Most recently, the Fifth Circuit followed the majority approach reflected in *Roadway* to hold that a choice-of-law provision does "not express the parties' clear intent to depart

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[4] Although it recognized the direct conflict between its holding and *Wolsey*, the decision below made no attempt to distinguish *Wolsey*, but instead rejected its holding based upon the Second Circuit's view that the Ninth Circuit improperly "relied on its interpretation of *Mastrobuono* to conclude that the choice-of-law provision did not incorporate section 1281.2(c)(4)." Pet. App. 9a n.4.

[5] The Sixth Circuit highlighted the importance of its holding that a general choice-of-law provision does *not* displace the FAA. 142 F.3d at 937. The *Ferro* court observed that "[m]ost contracts include a choice-of-law clause, and, thus, if each of these clauses were read to foreclose the application of the substantive law enacted by Congress in the FAA, the FAA would be applicable in very few cases. Such an interpretation of the FAA is simply not viable, as it would effectively emaciate the Act itself." *Id.* at 938.

from the FAA's vacatur standard." *Action Indus., Inc.* v. *United States Fid. & Guar. Co.*, 358 F.3d 337, 343 (5th Cir. 2004). Relying upon *Mastrobuono*, the *Action* court agreed that "'a generic choice-of-law clause, standing alone, is insufficient to support a finding that contracting parties intended to opt out of the FAA's default standards.'" *Id.* at 342 (quoting *Roadway*, 257 F.3d at 293). The Fifth Circuit explained that its reliance on *Mastrobuono* did not conflict with *Volt* because "the Court's analysis in *Volt* presupposed that the contract had expressed the parties' clear intent to depart from the FAA's rules." *Id.* at 342 n.15. These decisions are in accord with others from the First, Fourth, Eighth and Tenth Circuits.[6]

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[6] *See, e.g., PaineWebber Inc.* v. *Elahi*, 87 F.3d 589, 592, 594 (1st Cir. 1996) ("Following the principles and analysis set forth in *Mastrobuono*" to hold that a choice-of-law clause that required that the "agreement and its enforcement shall be construed and governed by the laws of the State of New York" did not displace the FAA); *Porter Hayden Co.* v. *Century Indem. Co.*, 136 F.3d 380, 382 (4th Cir. 1998) (interpreting *Mastrobuono* as "squarely reject[ing] the argument that a federal court should read a contract's general choice-of-law provision as invoking state law of arbitrability and displacing federal arbitration law"); *UHC Mgmt. Co.* v. *Computer Scis. Corp.*, 148 F.3d 992, 997 (8th Cir. 1998) (holding that it would "not interpret an arbitration agreement as precluding application of the FAA unless the parties' intent that the agreement be so construed is abundantly clear"); *Kelley* v. *Michaels*, 59 F.3d 1050, 1055 (10th Cir. 1995) (following *Mastrobuono* to hold that "'the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration'").

Several state courts of last resort also have relied upon *Mastrobuono* to conclude that a general choice-of-law clause will not be read to incorporate state arbitration law. *E.g., Zabinski* v. *Bright Acres Assoc.*, 553 S.E.2d 110, 117 (S.C. 2001) (choice-of-law clause governed the "validity and construction of the contract" but did not incorporate "state, rather than federal, arbitration law"); *L & L Kempwood Assocs., L.P.* v. *Omega Builders, Inc.*, 9 S.W.3d 125, 127-28 (Tex. 1999) (per curiam) (holding that a choice-of-law provision that did not exclude the application of federal law would not be read to incorporate state law governing stays).

2. In stark contrast, the Second Circuit, in the decision below, and the District of Columbia Circuit have held that a general choice-of-law provision is sufficient to opt out of the FAA and into state-law arbitration rules.

In the decision below, the court of appeals affirmed the district court's entry of a stay of all arbitration proceedings on the eve of the arbitration hearing. The court of appeals acknowledged that, under *Mastrobuono*, "as a matter of *federal* law, general choice-of-law clauses do not incorporate state rules that govern the allocation of authority between courts and arbitrators." Pet. App. 7a. The court below held that *Mastrobuono* did not govern this case because "the procedural provision in question here does not limit an arbitrator's authority." *Id.* But see *Wolsey*, 144 F.3d at 1212 (holding that Section 1281.2(c) "assuredly does affect California's 'allocation of power between alternative tribunals'"). Specifically, the court of appeals ruled that the "federal policy favoring arbitration" did not apply because "section 1281.2(c)(4) is a 'state procedural rule.'" Pet. App. 8a-9a. As a result, the Second Circuit looked exclusively to "California law" to "interpret the choice-of-law provision utilized in this contract." *Id.* at 9a.

In doing so, the court of appeals recognized that its approach and ruling were contrary to that of the Ninth Circuit in *Wosley*. Pet. App. 9a n.4. Indeed, the court below rejected *Wolsey* because it disagreed with the Ninth Circuit's "interpretation of *Mastrobuono* to conclude that the choice-of-law provision did not incorporate section 1281.2(c)(4)." *Id.* Instead, relying upon California decisions, the court of appeals believed that "the California Supreme Court would conclude [that the choice-of-law provision] evidences the parties' intent to incorporate section 1281.2(c)(4)" because "California abides by the general proposition that sophisticated commercial parties intend a generic choice-of-law clause to control the entire agreement." *Id.* at 10a. Reversing the presumption in favor of the FAA set forth in

Mastrobuono, the court of appeals ruled that "[i]f the parties intended for only California substantive law to govern, they could have easily made their intentions clearer with a second exclusion for California's arbitration rules." *Id.* at 11a.

Similarly, the D.C. Circuit has held that a general choice-of-law clause that provided that the agreement "'shall be governed by and construed in accordance with the internal laws of the State of Connecticut'" would be read to displace the FAA's provision setting a three-month limitations period governing "the timeliness of petitions to vacate arbitration awards." *Ekstrom*, 68 F.3d at 1393. Applying District of Columbia "choice of law principles," the court rejected the argument that the FAA rule applied because "neither the choice of law provision nor the arbitration clause contains an *express* agreement to apply the 30-day Connecticut time limit." *Id.* at 1395. Relying upon *Volt*, the *Ekstrom* court held that it could "discern no material difference" between an agreement that "*explicitly* called for the application of Connecticut's 30-day limitation period" and "the actual one in the parties' Merger Agreement calling for the application of Connecticut law." *Id.* at 1396.

3. This case directly implicates this abiding conflict among the federal courts of appeals. If the Second Circuit adopted the majority position as reflected in *Roadway* and *Wolsey*, it unquestionably could not have concluded that California law governed the arbitration of this dispute. The decisions applying the majority approach all have followed this Court's decision in *Mastrobuono* to rule, as a matter of federal law, that a general choice-of-law provision, "standing alone, is insufficient to support a finding that contracting parties intended to opt out of the FAA's default standards." *Roadway*, 257 F.3d at 296.[7]

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[7] *See Action*, 358 F.3d at 342 ("a choice-of-law provision is insufficient, by itself, to demonstrate the parties' clear intent to depart from the FAA's default rules"); *Sovak*, 270 F.3d at 1270 ("a general

In stark contrast, the court below purported to apply solely state contract law and stated that the "federal policy favoring arbitration" was inapplicable because Section 1281.2(c)(4) was merely a "'state procedural rule.'" Pet. App. 9a. In contrast, courts of appeals adopting the majority approach have made clear that under *Mastrobuono*, the question whether the FAA is displaced by state arbitration law is a question of "federal law." *Roadway*, 257 F.3d at 294 ("this case is *not* governed by state law—it is governed by federal law"); *Action*, 358 F.3d at 342 (following *Roadway*). Indeed, the Third Circuit expressly rejected a proposal whereby "generic choice-of-law clauses and arbitration clauses should be construed as incorporating all state arbitration rules that are 'procedural' in nature." *Roadway*, 257 F.3d at 298-99.

Similarly, the court of appeals relied upon California law, which it concluded "abides by the general proposition that sophisticated commercial parties intend a generic choice-of-law clause to control the entire agreement." Pet. App. 10a; see also *Ekstrom*, 68 F.3d at 1394 (relying upon District of Columbia choice-of-law rules). In contrast, courts in the majority have explained that such provisions shed little light on the question because they "typically embody the parties' choice of one state's laws over another's, rather than express a preference between federal and state law." *Porter Hayden*

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choice of law clause within an arbitration agreement within an arbitration provision does not trump the presumption that the FAA supplies the rules for arbitration"); *UHC Mgmt. Co.*, 148 F.3d at 997 (explaining that choice-of-law provision that "makes no reference to the Minnesota Uniform Arbitration Act or to Minnesota case law interpreting the allocation of powers between arbitrators and courts" was inadequate to displace FAA); *Ferro*, 142 F.3d at 937 ("the choice-of-law clause is not an 'unequivocal inclusion' of the Ohio rule"); *Porter Hayden*, 136 F.3d at 382 (rejecting argument "that a federal court should read a contract's general choice-of-law provision as invoking state law of arbitrability and displacing federal arbitration law"); *PaineWebber*, 87 F.3d at 594 (general choice-of-law clause did not displace the FAA); *Kelley*, 59 F.3d at 1055 ("'the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration'").

Co. v. *Century Indem. Co.*, 136 F.3d 380, 383 n.5 (4th Cir. 1998); *accord Roadway*, 257 F.3d at 293-94; *Ferro*, 142 F.3d at 983.[8]

Finally, the court below adopted a presumption such that "[i]f the parties intended for only California substantive law to govern, they could easily have made their intentions clearer with a second exclusion for California's arbitration rules." Pet. App. 11a; cf. *Ekstrom*, 68 F.3d at 1394. But that presumption in favor of state arbitration rules is diametrically opposed to the rule adopted by courts in the majority, which, in reliance upon *Mastrobuono*, presume that the FAA will apply unless provided clear evidence to the contrary. See *Roadway*, 257 F.3d at 296 (adopting "default rule" whereby "generic choice-of-law clause, standing alone, is insufficient . . . to opt out of FAA's default standards"); see also *supra* note 1 (citing cases that adopt presumption in favor of FAA).

B. Further Review Is Necessary Because The Decision Below Creates A Substantial Exception To The FAA That Is Unwarranted Under This Court's Decision In *Mastrobuono*.

Review by this Court is necessary because the decision below creates a broad exception to the FAA that is unwarranted as a matter of the parties' intent, conflicts with this Court's decision in *Mastrobuono*, and injects unnecessary

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[8] The choice-of-law provision at issue here underscores this fundamental point by expressly providing that on the issue of "credit for reinsurance" the "rules of all *applicable states* shall pertain thereto." Pet. App. 2a n.2 (emphasis added). As explained by *Roadway*, such a choice-of-law provision addresses "the horizontal question" of which *state*'s laws apply, but has "no applicability" to the "vertical" question of "whether the rule of decision is supplied by the laws of State X or by federal law." 257 F.3d at 293. That conclusion, of course, is the same one reached in *Mastrobuono*, where this Court held that "the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration." 514 U.S. at 64.

complexity and delay into an arbitral process that Congress sought to promote as an efficient and cost-effective alternative to litigation.

1. The court of appeals' holding—that a general choice-of-law provision should be read not only to substitute for a state's conflict-of-law analysis, but also to opt out of otherwise applicable *federal law*—is not supported by this Court's decisions.

In *Mastrobuono*, this Court held that a general "choice-of-law provision, when viewed in isolation, may reasonably be read as merely a substitute for the conflict-of-laws analysis that otherwise would determine what law to apply to disputes arising out of the contractual relationship." 514 U.S. at 59.[9] The Court held that "the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration; neither sentence intrudes upon the other." *Id.* at 64. In so ruling, this Court harmonized its prior decision in *Volt* by explaining that *Volt* did not involve contract interpretation, but instead addressed whether the FAA pre-empted arbitration pursuant to state-law rules that the Court *assumed* the parties had intended to incorporate into their agreement. *Id.* at 60 n.4.

Moreover, the approach adopted by the court below would limit the practical impact of the FAA considerably. As noted, the Sixth Circuit has explained, "[m]ost contracts include a choice-of-law clause, and, thus, if each of these clauses were read to foreclose application of the substantive law enacted by Congress in the FAA, the FAA would be applicable in very few cases." *Ferro*, 142 F.3d at 938. That limitation of the

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[9] The Third Circuit, in setting forth the majority approach, has echoed the more-limited role of choice-of-law provisions in contracts subject to the FAA, explaining that "few (if any) federal statutes other than the FAA even *permit* parties to opt out of the standards contained in them," and therefore "we are confident that this particular issue rarely occurs to contracting parties *ex ante*." 257 F.3d at 294.

FAA's scope conflicts with this Court's "expansive reading" of the FAA and its conclusion that Congress sought "'broadly to overcome judicial hostility to arbitration agreements.'" *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 118-19 (2001) (quoting *Allied-Bruce*, 513 U.S. at 272-73).

2. The decision below also misreads the standards set forth in *Mastrobuono*. There, this Court reaffirmed that, "'as a matter of federal law,'" "when a court interprets [a choice-of-law provision] in an agreement covered by the FAA, 'due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself [must be] resolved in favor of arbitration.'" *Mastrobuono*, 514 U.S. at 62 & n.8 (quoting *Volt*, 489 U.S. at 476, and *Moses H. Cone*, 460 U.S. at 24-25). Here, however, the court of appeals ruled that the "federal policy favoring arbitration" applied only to "restrictions on the parties' substantive rights or the arbitrator's powers," Pet. App. 8a, but did not apply to the "present case" which "does not involve those types of restrictions," *id.* at 9a (stating that Section 1281.2(c)(4) is only a "'state procedural rule'" that "'determines . . . the efficient order of proceedings'").

The notion that the "federal policy favoring arbitration" should not inform the determination whether the parties rejected the FAA in favor of "state *procedural* rules" reflects a profound misunderstanding of the FAA. The "substantive provisions" of the FAA are designed to protect the arbitral *procedures* chosen by the parties. Indeed, the very purpose of the FAA was to allow private parties to "'trade[] the *procedures* and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (emphasis added) (quoting *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). In this regard, the FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or *procedural policies*

to the contrary." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (emphasis added); see also *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 221 (1985) (holding that FAA "requires that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation"). The court of appeals' conclusion that the "federal policy favoring arbitration" should not apply to state arbitration procedures is contrary to settled precedent.

Further, the ruling by the court below that Section 1281.2(c) does not restrict an "arbitrator's power" is plainly wrong. Pet. App. 9a; compare *Wosley*, 144 F.3d at 1213. The arbitration clause at issue here addresses the default timing of the proceedings before the arbitral panel and reflects the parties' concern with the expeditious resolution of any dispute through arbitration. Pet. App. 35a-36a. The decision below, at a minimum, upends that schedule and withdraws from the arbitrators any authority to control the timing of the arbitral hearing or the panel's ultimate decision. As Justice White explained, "[b]elated enforcement of the arbitration clause . . . significantly disappoints the expectations of the parties and frustrates the clear purpose of their agreement." *Byrd*, 470 U.S. at 225 (White, J., concurring).

Indeed, this case involves direct interference with arbitrators' powers because the arbitral panel fully considered, and rejected, Security's request for a stay of the arbitral hearing in this case pending resolution of the Federal Litigation. Only after failing to obtain relief from that panel did Security seek the same relief from a court. Although it ultimately reached the wrong conclusion, even the district court acknowledged that "[t]his dispute involves the 'allocation of power between alternative tribunals.'" Pet. App. 21a (quoting *Mastrobuono*, 514 at 60); see also *Wolsey*, 144 F.3d at 1212 (Section 1281.2(c) "assuredly does affect California's 'allocation of power between alternative tribunals'" (quoting *Mastrobuno*, 514 U.S. at 64)).

3. Finally, the distinction drawn between the incorporation of "substantive" and "procedural" state law arbitration provisions adopted by the court below is inconsistent with the FAA because it injects an unnecessary level of complexity into an arbitral process whose chief benefits include efficiency and simplicity.

As explained by Third Circuit, distinguishing between "procedural" and "substantive" provisions "would unduly complicate the law in this area." *Roadway*, 257 F.3d at 299. Indeed, whenever a party "complained about multiple issues, at least one of which was 'procedural' and at least one of which [was] 'substantive' (however those terms are defined)," separate determinations would have to be made "balancing and applying multiple legal regimes within the same case." *Id.* Introduction of this additional level of complexity should be rejected in this context because it is unlikely to reflect the actual intent of the parties. As the *Roadway* court explained, it is "most unlikely that any sizeable number of parties would wish to be bound by some federal standards and some state ones." *Id.* What is more, this added complexity would undermine a principal benefit of arbitration, which is designed to provide a "less expensive alternative to litigation." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 280 (1995).

C. The Ruling Below Conflicts With Decisions Of This Court And Other Courts Of Appeals Holding That Issues Of Contract Interpretation Should Be Made By, Or Determined With Deference To, The Arbitral Panel.

What makes the court of appeals' holding particularly extreme is that respondent Security asked the arbitral panel to stay its hand in favor of Federal Litigation. The arbitral panel concluded that it was not compelled to do so under the parties' agreement and denied respondent Security's request for a stay. The ruling below thus also warrants further review because it is inconsistent with a host of decisions by this

Court and other federal courts of appeals that hold that arbitrators, and not courts, are presumptively responsible for resolving issues of contract interpretation and procedural questions arising out of an arbitration. See *Mastrobuono*, 514 U.S. at 60 n.4. Under this precedent, if there were any doubt about how the choice-of-law provision should be applied, the arbitral panel's decision refusing to stay its proceedings should have been respected by the courts below.

1. In *Howsam* v. *Dean Witter Reynolds*, 537 U.S. 79 (2002), this Court explained that "procedural questions which grow out of a dispute and bear on its final disposition are presumptively *not* for the judge, but for the arbitrator to decide." *Id.* at 84 (internal quotation marks omitted). Similarly, *Vimar Seguros Y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528 (1995), held that a court of appeals "was correct to reserve judgment on the choice-of-law question, as it must be decided in the first instance by the arbitrator." *Id.* at 541 (citation omitted). In *PacifiCare Health System, Inc.* v. *Book*, 123 S. Ct. 1531 (2003), this Court ruled that the arbitrator should first be permitted to interpret the scope of remedial limitations in the arbitration clause because a court should not "take upon [itself] the authority to decide the antecedent question of how [a contract term] is to be resolved." *Id.* at 1535-36. Finally, in *Green Tree*, 123 S. Ct. at 2408, the plurality ruled, *sua sponte*, that "the parties have not yet obtained the arbitration decision that their contracts foresee" and therefore "remand[ed] the case so that the arbitrator may decide the question of contract interpretation." *Id.* at 2407-08 (Breyer, J.).

Howsam, *Vimar Seguros*, *PacifiCare*, and *Green Tree* make clear that "procedural questions which grow out of the dispute and bear on its final disposition are presumptively *not* for the judge, but for an arbitrator," *Howsam*, 537 U.S. at 84 (internal quotation marks omitted), and that such issues include contract interpretation, *PacifiCare*, 123 S. Ct. at 1535-36; *Green Tree*, 123 S. Ct. at 2408 (plurality op.), including the

proper interpretation of a "choice-of-law" provision, *Vimar Seguros*, 515 U.S. at 541.

2. The court of appeals' decision conflicts with this Court's controlling precedent. The arbitration clause at issue provides that "any irreconcilable dispute between the parties to this Agreement shall be submitted for decision to a board of arbitration composed of two arbitrators and an umpire meeting [at] a place to be agreed by the board." Pet. App. 34a. Here, Security sought a stay of arbitration before the arbitral panel. Petitioner TIG opposed that motion because entry of a stay was inconsistent with the parties' agreement, was contrary to the FAA, and would frustrate TIG's right to a speedy and efficient resolution of the arbitral proceedings. Indeed, TIG explained that a stay effectively might "deprive TIG of its contractual right to arbitrate." Opposition to Stay at 5. After considering the opposing positions on this dispute, the arbitral panel agreed with TIG and rejected Security's request for a stay.

Undeterred, Security then sought the same relief in the Federal Litigation. Over TIG's objections, and in direct conflict with the arbitral panel's ruling, the district court and court of appeals independently sought to address an "irreconcilable dispute between the parties" on the question whether the parties' arbitration agreement authorized and warranted entry of a stay. *E.g.*, Pet. App. 27a n.10 (district court's ruling that arbitral panel's refusal to grant stay had no "preclusive effect" on its entry of a stay). Under the arbitration agreement and binding precedent, the court below was obligated either to allow the arbitral panel to decide whether the parties had intended to incorporate state arbitration rules into their arbitration agreement, or, at a minimum, to afford appropriate deference to the arbitral panel's refusal to grant a stay pending litigation. Its failure to do so cannot be reconciled with *Howsam* or *Green Tree*.

Further, the decision below also creates a conflict among the court of appeals on the question whether arbitrators or

courts should resolve issue of contract interpretation relating to the conduct of the arbitration. In *Bailey* v. *Ameriquest Mortgage Co.*, 346 F.3d 821 (8th Cir. 2003), the Eighth Circuit applied *Howsam* to concluded that "the extent of an arbitrator's procedural and remedial authority are issues for the arbitrator to resolve in the first instance." *Id.* at 824. Similarly, in *Pedcor Mgmt. Co. Welfare Benefit Plan* v. *Nations Personnel of Texas, Inc.*, 343 F.3d 355, 363 (5th Cir. 2003), the Fifth Circuit, held that on the question of contract construction, "pursuant to *Green Tree*, arbitrators should decide whether class arbitration is available or forbidden." *Id.* at 363. Finally, in *Anders* v. *Hometown Mortgage Services, Inc.*, 346 F.3d 1024 (11th Cir. 2003), the Eleventh Circuit, relying upon *Green Tree* and *Howsam*, concluded that "an arbitrator and not a court" should address whether "remedial restriction provisions" contained in the agreement were "valid as written" or "must be removed under the forgiving eye of the severance clause." *Id.* at 1032-33.

The failure of the court below to be bound by (or give appropriate deference to) the arbitral panel's ruling that a stay was not warranted under the parties' agreement conflicts with decisions of this Court and other federal courts of appeals and thus warrants further review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 8, 2004

APPENDIX A

UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT.

Docket No. 03-7773

SECURITY INSURANCE COMPANY OF HARTFORD,
Plaintiff-Appellee,

TRUSTMARK INSURANCE COMPANY,
Defendant-Third-Party-Plaintiff-Appellee,

v.

TIG INSURANCE COMPANY,
Third-Party-Defendant-Appellant.

Argued: Nov. 21, 2003.
Decided: March 2, 2004.

Before: OAKES, POOLER, and WESLEY, *Circuit Judges*.

WESLEY, *Circuit Judge*.

This case presents a recurring and troubling theme in many commercial contracts: to what extent must a court—confronted with a choice-of-law provision in a contract—incorporate the designated state's statutory and common law governing arbitrations even when doing so seems contrary to the Federal Arbitration Act ("FAA")?

I. *Background*

TIG Insurance Company ("TIG") and Security Insurance Company of Hartford ("Security") entered into a contract ("Reinsurance Agreement") whereby Security agreed to

reinsure a portion of TIG's liability for certain workers' compensation claims. The agreement was negotiated by Security's agent WEB Management LLC ("WEB"). The Reinsurance Agreement contains an arbitration clause in Article 27 [sic] submitting "any irreconcilable dispute between parties" to arbitration[1] and a choice-of-law clause in Article 28 [sic] that designates California's law as controlling.[2]

At the time it entered into the Reinsurance Agreement with TIG, Security also entered into another contract ("Retrocession Agreement") with Trustmark Insurance Company ("Trustmark") whereby Trustmark agreed to reinsure Security for 100% of the risk that Security had assumed from TIG under the Reinsurance Agreement. WEB acted as agent for both Security and Trustmark with regard to the Retrocession Agreement. That agreement does not contain an arbitration clause.

Several years thereafter, Trustmark informed Security that TIG had defrauded WEB in connection with the Reinsurance Agreement and suggested Security rescind that agreement. Security requested Trustmark provide proof of the alleged fraud. Instead of providing the requested proof, Trustmark notified Security it was rescinding their agreement. Security filed a complaint against Trustmark in federal court seeking

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[1] In full, the arbitration clause reads: "As a condition precedent to any right of action hereunder, any irreconcilable dispute between parties to this Agreement shall be submitted for decision to a board of arbitration composed of two arbitrators and an umpire meeting a place [sic] to be agreed by the board."

[2] In full, the governing clause states: "This Agreement shall be governed by and construed according to the laws of the state of California, except as to rules regarding credit for reinsurance in which case the rules of all applicable states shall pertain thereto. Notwithstanding the foregoing, in the event of a conflict between any provision of this Agreement and the laws of the domiciliary state of any company intended to be reinsured hereunder, that domiciliary state's laws shall prevail."

declarations that Trustmark was not entitled to rescind the Retrocession Agreement, that the agreement remained valid and binding, and that Trustmark was required to pay Security for all losses covered by the agreement.[3] Trustmark then filed a third-party complaint against TIG alleging TIG had fraudulently induced the Retrocession Agreement in an "attempt to transfer to its unsuspecting reinsurers[, Security and Trustmark,] tens of millions of dollars in losses stemming from its under-performing workers' compensation business."

A month prior to Trustmark's third-party complaint, Security suspended further claim payments to TIG based on Trustmark's allegations of fraud. In response, TIG invoked the arbitration clause in the TIG/Security Reinsurance Agreement. Security invited Trustmark to undertake the defense of TIG's claims against Security and further proposed resolving all of the issues pending in the lawsuit through arbitration. Security and Trustmark were unable to agree and the arbitration proceeded. As of this appeal, Security and TIG had selected the arbitrators and umpires, submitted positional statements to the arbitration panel, held an organizational hearing, and submitted proposed briefing and hearing schedules. Prior to the hearing, which was set to begin on August 11, 2003, however, Security moved before the arbitration panel to stay the arbitration pending the trial in the district court.

Thereafter, Security moved in district court to stay the arbitration pending completion of the court action. Security asserted that the choice-of-law provision in the Reinsurance Agreement reflects the intentions of TIG and Security to apply California's arbitration rules. Those rules include California Civil Procedure Code § 1281.2(c)(4),

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[3] Security also included claims under the Connecticut Unfair Insurance Practices Act, the Connecticut Unfair Trade Practices Act, and the common law for bad faith.

which permits a court to stay a pending arbitration where one of the parties is also a party to a pending court action arising out of the same transaction and there is a possibility of conflicting rulings.

The district court granted Security's motion relying primarily on *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). *See Sec. Ins. Co. of Hartford v. Trustmark Ins. Co.*, 283 F.Supp.2d 602 (D.Conn.2003). The district court rejected TIG's argument that *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995), required a different result. *See Sec. Ins. Co.*, 283 F.Supp.2d at 606-07. The court utilized California state law to determine whether the choice-of-law provision evidenced the parties' intent to incorporate California's arbitration rules. *See id.* at 608-10. Relying on a recent California Court of Appeals decision, the district court concluded that section 1281.2(c)(4) was applicable and stayed the pending arbitration between TIG and Security until the proceedings in the district court were completed. The district court also concluded that its ruling was not inconsistent with Second Circuit cases TIG had raised in opposition to the stay, noting those cases involved New York law. *See id.* at 610-11. The district court also held that Security's conduct in preparation for arbitration did not waive its right to seek the stay. *See id.* at 611.

TIG appeals and we now affirm the district court's order.

II. *Discussion*

Section 2 of the FAA ensures that courts enforce arbitration clauses incorporated in contracts involving interstate commerce, thereby "creat[ing] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74

L.Ed.2d 765 (1983); *see also* 9 U.S.C. § 2. The FAA requires that "questions of arbitrability . . . be addressed with a healthy regard for the federal policy favoring arbitration," and that "any doubts concerning the scope of arbitrable issues . . . be resolved in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24-25, 103 S.Ct. 927. The federal policy favoring arbitration, however, does not change the long established principle that "[a]rbitration 'is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1198 (2d Cir.1996) (quoting *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986)). Rather, the FAA requires "arbitration proceed *in the manner provided for in [the parties'] agreement.*" *Volt*, 489 U.S. at 475, 109 S.Ct. 1248 (quoting 9 U.S.C. § 4) (emphasis in original). In *Volt*, the Court made clear that "[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Id.* at 476, 109 S.Ct. 1248.

Security agrees that the Reinsurance Agreement falls within the scope of the FAA, but argues that by including the California choice-of-law provision, the parties' evidenced their intent to employ California arbitration rules. Section 1281.2(c) provides that if a "court determines that a party to [an] arbitration is also a party to litigation in a pending court action or special proceeding with a third party [arising out of the same transaction and there is a possibility of conflicting rulings on a common issue of law or fact], the court . . . (4) may stay arbitration pending the outcome of the court action or special proceeding." Cal.Civ.Proc.Code § 1281.2(c). Security contends that this section does not manifest a preference for lawsuits over arbitration, but is merely a procedural mechanism that dictates the order in which the

two proceedings are to occur. It relies heavily on *Volt* and rightly so.

In *Volt*, the Supreme Court held that this specific provision is not preempted by the FAA "in a case where the parties have agreed that their arbitration agreement will be governed by the law of California." *Volt*, 489 U.S. at 470, 109 S.Ct. 1248. Volt Information Sciences, Inc. ("Volt") and Leland Stanford Junior University ("Stanford") had entered into a contract providing that all disputes would "be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then prevailing unless the parties mutually agreed . . . otherwise." *Id.* at 470 n. 1, 109 S.Ct. 1248. The agreement also provided that it would "be governed by the law of the place where the Project was located," which under the facts of *Volt* was California. *Id.* at 470, 109 S.Ct. 1248. When Stanford filed suit in federal court against Volt and several third parties, Volt moved to compel arbitration, leading Stanford to move to stay arbitration under section 1281.2(c)(4). *Id.* at 470-71, 109 S.Ct. 1248. The California Court of Appeals affirmed the lower court's grant of the stay, recognizing that the contract was subject to the FAA but holding that, by specifying the contract would be governed by California law, the parties had incorporated California's arbitration rules into their agreement. Thus, the parties contractually had agreed that arbitration would be governed by section 1281.2(c)(4) allowing a court to stay the arbitration. The Supreme Court upheld the stay and the court's construction of the choice-of-law provision noting that federal policy favoring arbitration did not require a certain set of procedural rules, "even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward." *Id.* at 479, 109 S.Ct. 1248.

In *Volt*, the parties were permitted to structure their arbitration procedures as they saw fit, including incorporating

California law. Furthermore, the Supreme Court refused to review the California court's construction of the contract noting that "the interpretation of private contracts is ordinarily a question of state law." *Id.* at 474, 109 S.Ct. 1248; *see also PaineWebber*, 81 F.3d at 1198 ("[I]n interpreting an arbitration agreement we apply the principles of state law that govern the formation of ordinary contracts."). *Volt* controls the present case. It compellingly tells us that section 1281.2(c)(4) is a procedural rule for arbitration and therefore is not preempted by the FAA. The only remaining question is whether the choice-of-law provision reveals the intention of TIG and Security to incorporate California's procedural arbitration rules—including section 1281.2(c)(4)—into the contract. The district court, following *Volt*'s instruction, looked to California law.

TIG argues that *Mastrobuono*, as well as Second Circuit precedent, has altered *Volt*'s directive with regard to analyzing choice-of-law clauses in contracts. TIG contends that those cases now require that as a matter of *federal* law, general choice-of-law clauses do not incorporate state rules that govern the allocation of authority between courts and arbitrators. While TIG may have correctly characterized *Mastrobuono*, the procedural provision in question here does not limit an arbitrator's authority. In *Mastrobuono*, the parties incorporated an arbitration clause in their contract requiring the arbitration proceedings be conducted in accordance with the rules of the National Association of Securities Dealers. Those rules allow arbitrators to award punitive damages. However, the contract also contained a choice-of-law provision stating the agreement would be "governed by the laws of the state of New York." *Mastrobuono*, 514 U.S. at 59 n. 2, 115 S.Ct. 1212. In New York, the *Garrity* rule provides that the power to award punitive damages is limited to judicial tribunals and is not within an arbitrator's authority. *Id.* at 55, 115 S.Ct. 1212 (citing *Garrity v. Lyle Stuart, Inc.*, 40 N.Y.2d 354, 386 N.Y.S.2d 831, 353

N.E.2d 793 (1976)). Following arbitration and an award of punitive damages, respondents in *Mastrobuono* moved to vacate the award.

The Court recognized that "the choice-of-law clause introduces an ambiguity into an arbitration agreement that would otherwise allow punitive damages awards." *Id.* at 62, 115 S.Ct. 1212. In an attempt to give effect to all of the provisions of the contract, the Supreme Court held that "the best way to harmonize the choice-of-law provision with the arbitration provision is to read 'the laws of the State of New York' to encompass substantive principles that New York courts would apply, *but not to include special rules limiting the authority of arbitrators.*" *Id.* at 63-64, 115 S.Ct. 1212 (emphasis added). Following *Mastrobuono*, our circuit has held that a general "choice of law provision will not be construed to impose substantive restrictions on the parties' rights under the Federal Arbitration Act." *PaineWebber*, 81 F.3d at 1202. Similarly, this Court has rejected the argument that a general choice-of-law provision without more evidences the parties' intent "to incorporate New York decisional law on the allocation of powers between the court and the arbitrator." *Nat'l Union Fire Co. v. Belco Petroleum Corp.*, 88 F.3d 129, 134 (2d Cir.1996); *see also Shaw Group, Inc. v. Triplefine Int'l Corp.*, 322 F.3d 115, 123 (2d Cir.2003).

The Second Circuit cases dealt with New York not California law. But more importantly, these cases involved "substantive restrictions on the parties' rights under the Federal Arbitration Act," *PaineWebber*, 81 F.3d at 1202, or "special rules limiting the authority of arbitrators." *Mastrobuono*, 514 U.S. at 64, 115 S.Ct. 1212. In cases where an ambiguity is introduced by the choice-of-law provision, federal policy favoring arbitration requires a specific reference to the restrictions on the parties' substantive rights or the arbitrator's powers to establish that the parties clearly

intended to limit their rights under the FAA. The present case does not involve those types of restrictions. Section 1281.2(c)(4) gives the court the power to stay an arbitration; it does not limit the rights of the parties to arbitrate particular issues or the arbitrator's power to resolve the dispute. As *Volt* makes clear, section 1281.2(c)(4) is a "state procedural rule[ ]" that "determine[s] only the efficient order of proceedings" and does "not affect the enforceability of the arbitration agreement itself." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996) (citing *Volt*, 489 U.S. at 478-79, 109 S.Ct. 1248). As the district court correctly held, *Volt* tells us that the FAA does not preempt section 1281.2(c)(4) and therefore, we return to the question previously raised—how does California law interpret the choice-of-law provision utilized in this contract.

The district court looked to the California state court decision in *Volt* as well as a more recent case, *Mount Diablo Medical Center v. Health Net of California, Inc.*, 101 Cal.App.4th 711, 124 Cal.Rptr.2d 607 (Cal.Ct.App.2002), to chart a course in this regard.[4] As noted above, in *Volt*, the California Court of Appeals interpreted a similar choice of law provision as evidencing an intent to include section 1281.2(c)(4). Unfortunately, we cannot rely on the Court of

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[4] TIG correctly argues that, except in rare circumstances, we defer to the Ninth Circuit's "prediction of the course of [California] law on a question of first impression within [California]." *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278, 283 (2d Cir.1981). TIG contends that the Ninth Circuit has indicated that California law would require that a choice-of-law clause would have to incorporate specifically California's procedural arbitration rules. *See Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205 (9th Cir.1998). TIG's reliance on *Wolsey* is misplaced, however, because in that case the Ninth Circuit relied on its interpretation of *Mastrobuono* to conclude that the choice-of-law provision did not incorporate section 1281.2(c)(4). *See id.*, 144 F.3d at 1212. The Ninth Circuit did not predict how the California Supreme Court would rule on the question of state law.

Appeals' decision in *Volt*; the California Supreme Court denied discretionary review in that case and ordered that the opinion not be published. Thus, under California law, that decision cannot be considered authoritative. *See* California Rule of Court 977.

In *Mount Diablo*, the contract in question included a broad choice-of-law clause that read: "The validity, construction, interpretation and enforcement of this Agreement shall be governed by the laws of the state of California." *Mount Diablo*, 101 Cal.App.4th at 716, 124 Cal.Rptr.2d 607. In determining the parties' intentions, the court observed that although the choice-of-law clause was "generic" because it did not mention arbitration, it was still "broad, unqualified and all-encompassing." *Id.* at 722, 124 Cal.Rptr.2d 607. Thus, the choice-of-law provision was construed to incorporate California's procedural rules regarding arbitration including section 1281.2(c)(4).

The choice-of-law provision in the present case is similarly broad and all encompassing. We agree with the district court that the California Supreme Court would conclude it evidences the parties' intent to incorporate section 1281.2(c)(4). California abides by the general proposition that sophisticated commercial parties intend a generic choice-of-law clause to control the entire agreement. *See Nedlloyd Lines B.V. v. Superior Court*, 3 Cal.4th 459, 468-69, 11 Cal.Rptr.2d 330, 834 P.2d 1148 (1992). *Nedlloyd* involved language identical to the clause in the Reinsurance Agreement, except for the forum selected—Hong Kong. *Id.* at 463, 11 Cal.Rptr.2d 330, 834 P.2d 1148. In that case, the California Supreme Court reasoned that "[t]he phrase 'governed by' is a broad one signifying a relationship of absolute direction, control, and restraint." *Id.* at 469, 11 Cal.Rptr.2d 330, 834 P.2d 1148. In addition, the choice-of-law provision in the present case includes an exception for "rules regarding credit for reinsurance in which case the rules of all applicable states

shall pertain thereto." If the parties intended for only California substantive law to govern, they could easily have made their intentions clearer with a second exclusion for California's arbitration rules.

Finally, as the *Mount Diablo* court observed, "where the state arbitration provision is not inconsistent with the FAA policy of enforcing arbitration procedures chosen by the parties, choice-of-law clauses making no explicit reference to arbitration commonly have been interpreted to incorporate the state's law governing the enforcement of arbitration agreements." *Mount Diablo*, 101 Cal.App.4th at 725, 124 Cal.Rptr.2d 607.[5] The Supreme Court has examined the procedural rule in question here and found it consistent with the FAA's broad policy goals. *See Volt*, 489 U.S. at 479, 109 S.Ct. 1248. We believe the district court was correct in determining that the California Supreme Court would rule that the choice-of-law provision did incorporate the state's procedural rules for arbitration. Thus, we affirm its holding.

We also find TIG's waiver argument without merit. TIG claims Security's participation in the preliminary arbitration proceedings resulted in a waiver of its right to seek a stay of the arbitration pending the outcome of the related litigation. To support its argument, however, TIG cites only cases that stand for the principle that a party that engages in an arbitration hearing cannot then contest the right to arbitrate. *See, e.g., Opals on Ice Lingerie v. Body Lines Inc.*, 320 F.3d 362, 368 (2d Cir.2003); *ConnTech Dev. Co. v. Univ. of Conn. Educ. Props., Inc.*, 102 F.3d 677, 685 (2d Cir.1996).

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[5] We do not accept TIG's argument that *Mount Diablo* is distinguishable because the choice-of-law clause included the phrase "enforcement." The court reasoned that the inclusion of this phrase helped the court discern the parties' intent to include section 1281.2(c)(4), but contrary to TIG's argument, this was not the sole ground for the court's finding. *Mount Diablo*, 101 Cal.App.4th at 722-25, 124 Cal.Rptr.2d 607.

In this case, the arbitration hearing has not commenced. Furthermore, Security notified TIG and the arbitration panel early in the proceedings of the possibility that it would move to stay the arbitration while the litigation was pending. Thus, we affirm the district court's holding.

III. *Conclusion*

The district court's order of August 5, 2003, granting appellee's motion to stay the pending arbitration is hereby AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT,
D. CONNECTICUT.

No. CIV.3:01CV2198(PCD).

SECURITY INSURANCE COMPANY OF HARTFORD,
Plaintiff,

v.

TRUSTMARK INSURANCE COMPANY,
Defendant.

Aug. 5, 2003.

RULING ON PLAINTIFF'S MOTION TO STAY ARBITRATION

DORSEY, *District Judge*.

Plaintiff moves to stay arbitration proceedings between it and third party defendant TIG Insurance Co. ("TIG") pending the outcome of the present litigation. The motion to stay is granted.

I. BACKGROUND

Familiarity with the prior rulings of this Court is presumed. TIG and plaintiff entered into a Reinsurance Agreement ("Agreement"), effective January 1, 1999, which contains an arbitration clause providing that

> As a condition to any right of action hereunder, any irreconcilable dispute between the parties to this Agreement shall be submitted to a board of arbitration com-

> posed of two arbitrators and an umpire meeting at a place to be agreed by the board. . . . The majority decision of the board shall be final and binding upon all parties to the proceeding. Judgment may be entered upon the award of the board in any court having jurisdiction.

The Agreement also contains a separate choice of law clause providing that

> This Agreement shall be governed by and construed according to the laws of the state of California, except as to rules regarding credit for reinsurance in which case the rules of all applicable states shall pertain thereto. Notwithstanding the foregoing, in the event of a conflict between any provision of this Agreement and the laws of the domiciliary state of any company intended to be reinsured hereunder, that domiciliary state's laws shall prevail.

On May 3, 2002, defendant filed a third-party complaint against TIG alleging fraud and negligent misrepresentation "based upon the material misrepresentations and omissions made by [TIG] in its attempt to transfer to its unsuspecting reinsurers tens of millions of dollars in losses stemming from its under-performing workers' compensation business." Defendant seeks damages equal to "all net losses [defendant] has paid or is required to pay to [plaintiff] on the TIG business retroceded to [defendant] by [plaintiff]."

By letter dated June 27, 2002, TIG notified that it was invoking the arbitration clause and initiating arbitration. TIG moved to stay proceedings in the present case pending resolution of issues through arbitration, which motion was denied.

II. DISCUSSION

Plaintiff argues that arbitration should be stayed (1) pursuant to CAL. CIV. PROC. CODE § 1281.2(c)[1] or (2) under the All Writs Act, 28 U.S.C. § 1651.[2] TIG responds that this Court has no authority to grant a stay of the arbitration proceedings.

Plaintiff argues that this Court may grant a stay pursuant to § 1281.2(c), notwithstanding the absence of such a provision in the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, which undisputedly applies to the present agreement absent an exception to its applicability.

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[1] CAL. CIV. PROC. CODE § 1281.2 provides in relevant part that "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that . . . (c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact. For purposes of this section, a pending court action or special proceeding includes an action or proceeding initiated by the party refusing to arbitrate after the petition to compel arbitration has been filed, but on or before the date of the hearing on the petition. . . . If the court determines that a party to the arbitration is also a party to litigation in a pending court action or special proceeding with a third party as set forth under subdivision (c) herein, the court (1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or special proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or special proceeding."

[2] As plaintiff's motion is granted based on state law, there is no need to address whether such authority exists under the All Writs Act.

This is not the first time a party has sought to stay arbitration proceedings in deference to ongoing litigation. In *Volt Information Sciences v. Board of Trustees*, 489 U.S. 468, 470-72, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989), a California Court of Appeal construed a choice of law clause providing that "[t]he Contract shall be governed by the law of the place where the Project is located" as incorporating the California procedural law and affirmed the trial court decision granting a stay of arbitration pursuant to § 1281.2(c). The California Supreme Court denied discretionary review, and the United States Supreme Court granted certiorari. *Volt Info. Sciences*, 489 U.S. at 472, 109 S.Ct. 1248. In resolving the potential conflict between the FAA and California arbitration law, the Court deferred to the state court interpretation of the choice of law provision. *Id.* at 474, 476, 109 S.Ct. 1248 ("assuming the choice-of-law clause meant what the Court of Appeal found it to mean"), and concluded that

> we do not think the Court of Appeal offended the *Moses H. Cone* principle by interpreting the choice-of-law provision to mean that the parties intended the California rules of arbitration, including the § 1281.2(c) stay provision, to apply to their arbitration agreement. There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate. Interpreting a choice-of-law clause to make applicable state rules governing the conduct of arbitration—rules which are manifestly designed to encourage resort to the arbitral process—simply does not offend the rule of liberal construction set forth in *Moses H. Cone*, nor does it offend any other policy embodied in the FAA.

Id. at 476, 109 S.Ct. 1248. The Court further concluded that "Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the

terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward." *Id.* at 479, 109 S.Ct. 1248.

While plaintiff argues that *Volt* resolves the present question and permits the application of the § 1281.2(c) stay provision, TIG argues that *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995), requires otherwise. *Mastrobuono* involved a New York law granting courts the authority to award punitive damages by refusing such authority to arbitrators, and a choice of law clause providing that the agreement "shall be governed by the laws of the State of New York." *Id.* at 53, 115 S.Ct. 1212. The arbitrators awarded compensatory and punitive damages, but a federal district court vacated the punitive damages award concluding that the arbitrators were without authority to issue the award, which decision was affirmed by the court of appeals. *Id.* at 54-55, 115 S.Ct. 1212. Certiorari was granted "because the Courts of Appeals have expressed differing views on whether a contractual choice-of-law provision may preclude an arbitral award of punitive damages that otherwise would be proper." *Id.* at 55, 115 S.Ct. 1212.

In reversing the decision of the Court of Appeals, the Court interpreted the two successive sentences in the agreement providing that the "agreement . . . shall be governed by the laws of the State of New York" and "any controversy . . . shall be settled by arbitration in accordance with the rules then in effect, of the National Association of Securities Dealers, Inc. or the Boards of Directors of the New York Stock Exchange, Inc. and/or the American Stock Exchange Inc." *Id.* at 58 n. 2, 115 S.Ct. 1212. The Court concluded that "[a]t most, the choice-of-law clause introduces an ambiguity into an arbitration agreement that would otherwise allow punitive damages awards," *id.* at 62, 115 S.Ct. 1212. Using

as guidelines the principles that "due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration," *id.*, "the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it," *id.*, and that "a document should be read to give effect to all its provisions and to render them consistent with each other," *id.* at 63, 115 S.Ct. 1212, the Court concluded that the Court of Appeal misinterpreted the agreement and reversed the order vacating the punitive damages award by the arbitrators, *id.* at 64, 115 S.Ct. 1212.

The import of the *Mastrobuono* and *Volt* decisions is a fertile source of debate,[3] with state and federal courts arriving at conclusions far too varied to mention here. In an effort to resolve conflicting interpretations, two circuit courts have adopted a presumption "that a generic choice-of-law clause, standing alone, is insufficient to support a finding that contracting parties intended to opt out of the FAA's default standards." *Roadway Package Sys. v. Kayser*, 257 F.3d 287, 296 (3d Cir.2001); *Sovak v. Chugai Pharm.*, 280 F.3d 1266, 1269 (9th Cir.2002) ("the strong default presumption is that the FAA, not state law, supplies the rules for arbitration").

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[3] *See, e.g.*, Thomas A. Diamond, *Choice of Law Clauses and Their Preemptive Effect on the Federal Arbitration Act: Reconciling the Supreme Court with Itself*, 39 ARIZ. L. REV. 35 (1997); Heather J. Haase, Note, *In Defense of Parties' Rights to Limit Arbitral Awards Under the Federal Arbitration Act: Mastrobuono v. Shearson Lehman Hutton, Inc.*, 31 WAKE FOREST L. REV. 309 (1996); Joshua M. Barrett, Note, *Federal Arbitration Policy After Mastrobuono v. Shearson Lehman Hutton, Inc.*, 32 WILLAMETTEL. REV. 517, 534 (1996). It is noteworthy, given the problems presented by the interaction of arbitration and choice of law clauses, that the Ninth Circuit Court of Appeals has established a "strong default presumption . . . that the FAA, not state law, supplies the rules for arbitration." *Sovak v. Chugai Pharmaceutical Co.*, 280 F.3d 1266, 1269 (9th.Cir.2002).

Although this default rule has the benefit of simplicity, it overlooks the interpretative process inherent in carrying out the fundamental policy of the FAA of ensuring "the enforceability, according to their terms, of private agreements to arbitrate." *Volt Info. Sciences*, 489 U.S. at 476, 109 S. Ct. 1248.

The two Supreme Court decisions further stand for separate propositions. The issue in *Volt* was not contract interpretation, *see Mastrobuono*, 514 U.S. at 60 n. 4, 115 S.Ct. 1212 ("we did not interpret the contract *de novo* . . . [but i]nstead . . . deferred to the California court's construction of its own State's law"), in concluding that "even if §§ 3 and 4 of the FAA are fully applicable in state-court proceedings, they do not prevent application of CAL. CIV. PROC. CODE ANN. § 1281.2(c) to stay arbitration where, as here, the parties have agreed to arbitrate in accordance with California law," *Volt Info. Sciences*, 489 U.S. at 477, 109 S.Ct. 1248. *Mastrobuono*, in comparison, did not simply accept the interpretation of the lower courts and devoted a substantial portion of its decision to interpretation of the agreement.[4] *See Mastrobuono*, 514 U.S. at 60 n. 4, 115 S.Ct. 1212 ("[i]n the present case, by contrast, we review [*de novo*] a federal court's interpretation of this contract, and our interpretation").

As *Volt* resolves the question of whether the very state statute at issue here, § 1281.2(c), is preempted by the FAA, all that remains is a question of contract interpretation. In

[4] *Volt* involved the substantial deference afforded an interpretation of an agreement by the California Court of Appeal, *see Bush v. Gore*, 531 U.S. 98, 114, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000) ("we generally defer to state courts on the interpretation of state law"), whereas *Mastrobuono* involved unrestricted review of the interpretation of an agreement by a federal court, *see Salve Regina College v. Russell*, 499 U.S. 225, 231, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991) ("a court of appeals should review *de novo* a district court's determination of state law").

cases involving a choice-of-law provision, "that provision must be honored, and a court interpreting the agreement must follow the law of the jurisdiction selected by the parties." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002) (Thomas, J., concurring); *Volt Info. Sciences, Inc.*, 489 U.S. at 474, 109 S.Ct. 1248 ("the interpretation of private contracts is ordinarily a question of state law"). Concerns applicable to interpretation under state law have been defined as follows:

> [S]tate law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2. A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law.

Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional De Venezuela, 991 F.2d 42, 46 (2d Cir.1993).

The interaction between an arbitration clause, undisputedly governed by the FAA, and a generic choice-of-law clause, further involves the interaction of state and federal law.

> When required to determine the legal standards governing a particular controversy, courts typically confront two choice-of-law questions. The first is the horizontal question: whether the laws of State X or State Y supply the relevant rule of decision. Choice-of-law doctrines (and, consequently, choice-of-law clauses) speak to this issue. The second choice-of-law question that courts face is the vertical one: whether the rule of decision is supplied by the laws of State X or by federal law.

Roadway Package Sys., 257 F.3d at 293. Although the problem definition is clear, the resolution is not. The court in *Kayser* proceeded to conclude that

> [j]udge-made choice-of-law doctrines (and, accordingly, attempts by contracting parties to influence their application with choice-of-law clauses) have no applicability to answering [the second] question because the relevant rule is supplied by the Constitution itself: a valid federal law preempts any state law purporting to regulate the same issue.

Id. at 293-94. The interaction of federal and state law requires determination of the parties' ability to contract around the FAA. *See id.* at 294. Although the FAA preempts state arbitration rules, absent the parties' intent to incorporate the same, state law provides the tools by which the intent of the parties is ascertained. If the parties so intend it, the otherwise preempted state arbitration law supersedes the FAA by the parties' choice. The resolution of the question lies in fundamental principles of contract interpretation under, in the present case California, state law.[5]

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[5] It is significant to note that the present dispute is not one of arbitrability of an issue, *i.e.*, "whether the . . . agreement creates a duty for the parties to arbitrate the particular grievance," *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 647, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986), or "whether [there is an agreement] to arbitrate the merits" of the dispute, *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995); *see also Nat'l Union Fire Ins. Co. v. Belco Petroleum Corp.*, 88 F.3d 129, 135 (2d Cir.1996) ("The 'arbitrability' of a dispute comprises the questions of (1) whether there exists a valid agreement to arbitrate at all under the contract in question . . . and if so, (2) whether the particular dispute sought to be arbitrated falls within the scope of the arbitration agreement."). This dispute involves the "allocation of power between alternative tribunals." *Mastrobuono*, 514 U.S. at 60, 115 S.Ct. 1212.

As a court sitting in diversity, in the present case this Court is bound by the decisions of the California Supreme Court, and in the absence of a decision must estimate how that court would construe the present agreement. *See Commissioner v. Estate of Bosch*, 387 U.S. 456, 465, 87 S.Ct. 1776, 18 L.Ed.2d 886 (1967) ("[i]f there be no decision by that court then federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State"); *Francis v. INA Life Ins. Co.*, 809 F.2d 183, 185 (2d Cir.1987). No similar provision has been interpreted by the California Supreme Court involving an arbitration agreement.[6] As such, the provision will be interpreted pursuant to California law giving due regard to the decisions of its state courts.

Under California law, a contract must be interpreted as to give effect to the mutual intent of the parties. CAL. CIV. CODE § 1636. Intent is derived from the language of the agreement, if clear and explicit, *id.* § 1638; *Universal Sales Corp. v. Cal. Press Mfg. Co.*, 20 Cal.2d 751, 128 P.2d 665 (1942), and such intent, when a contract is reduced to writing, should be ascertained from the writing alone when possible, CAL. CIV. CODE § 1639. Ambiguities in contractual terms are resolved through review of "the entire agreement" and guidance sought from "the circumstances and relations of the

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[6] The choice of law clause at issue in *Volt* was denied discretionary review by the California Supreme Court. *Volt Info. Sciences*, 489 U.S. at 472-73, 109 S.Ct. 1248. As such, the denial may not be read as an endorsement of the opinion of the California Court of Appeals. *See Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917-19, 70 S.Ct. 252, 94 L.Ed. 562 (1950) (noting that "there are . . . conflicting and, to the uninformed, even confusing reasons for denying petitions for certiorari"); *Camper v. Workers' Comp. Appeals Bd.*, 3 Cal.4th 679, 12 Cal.Rptr.2d 101, 836 P.2d 888, 894 n. 8 (1992) ("a denial of a petition for review is not an expression of opinion of the Supreme Court on the merits of the case").

parties at the time of the execution of their agreements and of the insertion of particular clauses therein." *Smith v. Carlston*, 205 Cal. 541, 271 P. 1091, 1094 (1928).

In *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal.4th 459, 11 Cal.Rptr.2d 330, 834 P.2d 1148, 1154 (1992), the court construed a choice of law clause providing that "[t]his agreement shall be governed by and construed in accordance with Hong Kong law," which is substantially similar to the present choice of law clause providing that the "[a]greement shall be governed by and construed according to the laws of the state of California." Although the choice of law issue involved therein was the breadth of substantive law encompassed by the choice-of-law, the decision provides guidance on both interpretation of agreements involving sophisticated commercial entities and the import of the very language contained in the present choice-of-law clause.

As to agreements between sophisticated entities, the court in *Nedlloyd* points out that

> [Defendant's] view of the problem—which would require extensive litigation of the parties' supposed intentions regarding the choice-of-law clause to the end that the laws of multiple states might be applied to their dispute—is more likely the product of post-dispute litigation strategy, not predispute contractual intent. If commercially sophisticated parties (such as those now before us) truly intend the result advocated by [defendant], they should, in fairness to one another and in the interest of economy in dispute resolution, negotiate and obtain the assent of their fellow parties to explicit contract language specifying what jurisdiction's law applies to what issues.

Id. at 1154. The highest court in California therefore concluded that sophisticated commercial parties, as involved in the present case, would necessarily craft the choice-of-law

provision to reflect a narrower application of the law of the forum state. Inclusion of the phrase "governed by" was construed as "signifying a relationship of absolute direction, control, and restraint. Thus, the clause reflects the parties' clear contemplation that 'the agreement' is to be completely and absolutely controlled by" the law of the forum state. *Id.* at 1153-54. As such, the California Supreme Court would conclude, under the same circumstances, that the choice of law clause would incorporate the state rules applicable to arbitration proceedings, regardless of its characterization as a procedural rule. *See Hambrecht & Quist Venture Partners v. Am. Med. Int'l*, 38 Cal.App.4th 1532, 1548, 46 Cal.Rptr.2d 33 (1995) (reading identical language as incorporating both substantive and procedural law of forum).[7]

Of the appellate decisions cited, only *Mount Diablo Medical Center v. Health Net, Inc.* 101 Cal.App.4th 711, 124 Cal.Rptr.2d 607 (2002), bears mentioning. In concluding that the choice-of-law clause incorporated state rules governing arbitration, the court indicated that

> the starting point in the interpretation of the choice-of-law clause, like any contractual provision, is with the language of the contract itself. While [defendant] attempts to group all choice-of-law clauses that make no explicit reference to arbitration under the rubric 'generic,' the term has no precise definition. If by that term is meant a choice-of-law provision that states that the agreement will be governed by the law of a particular state without elaborating the specific provisions of state

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[7] *Cronus Investments, Inc. v. Concierge Services, LLC*, 107 Cal.App.4th 1308, 133 Cal.Rptr.2d 384 (2003), cited by plaintiff, is unpublished and by rule without any precedential value. *See* CAL. R. CT. 977(a) (providing that "[a]n opinion of a Court of Appeal . . . that is not certified for publication or ordered published shall not be cited or relied on by a court or a party in any other action or proceeding").

> law to which it applies . . ., and if such a 'generic' provision is insufficient to incorporate the state's laws concerning the enforcement of arbitration agreements, requiring such a redundancy before the provision will have any effect leads logically to the conclusion that other provisions . . . may also need to contain that redundant choice, e.g., provisions treating indemnification rights or termination events in contracts involving the interstate transportation of products. . . . We agree with the observation of the concurring judge in *Roadway Package*, who rejected the approach that the FAA controls absent extrinsic evidence of an intent to contract out of the FAA's default regime . . . in favor of the traditional attempt to discern the intention of the parties, that [t]he choice of law almost invariably is meant to encompass the entire agreement.

Mount Diablo Med. Ctr., 101 Cal.App.4th at 722, 124 Cal.Rptr.2d 607.

Other than the court's citation to the New York Court of Appeals' decision in *Smith Barney, Harris Upham & Co. v. Luckie*, 85 N.Y.2d 193, 623 N.Y.S.2d 800, 805, 647 N.E.2d 1308 (1995), which was later called into question by the Second Circuit Court of Appeals for its application of New York law, the analysis is sound. *See PaineWebber, Inc. v. Bybyk*, 81 F.3d 1193, 1200 (2d Cir.1996) ("In *Mastrobuono*, the Supreme Court rejected the argument that PaineWebber makes here and the argument that the New York Court of Appeals advanced in *Luckie* . . . . [A] choice of law provision, without more, cannot impute a specific intent of the parties to exclude punitive damages."). The present

conclusion does not, however, rest on the proper application of New York law.[8]

The above conclusion is not inconsistent with *Mastrobuono*. The central issue therein was "whether the arbitrators' award is consistent with the central purpose of the Federal Arbitration Act to ensure that private agreements to arbitrate are enforced according to their terms." *Mastrobuono*, 514 U.S. at 53-54, 115 S.Ct. 1212 (internal quotation marks omitted). As New York law precluded arbitrators from awarding punitive damages, *id.* at 58, 115 S.Ct. 1212, and the agreement to arbitrate provided for an award of punitive damages, *id.* at 64, 115 S.Ct. 1212, the FAA would "withdr[aw] the power of [New York] to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration," *id.* at 56, 115 S.Ct. 1212 (internal quotation marks omitted). Unlike the prohibition placed on the recognition of arbitration awards imposed by New York law in *Mastrobuono*, the "application of CAL. CIV. PROC. CODE ANN. § 1281.2(c) to stay arbitration under this contract in interstate commerce, in accordance with the terms of the arbitration agreement itself, '[will not] undermine the goals and policies of the FAA.' " *Volt Info. Sciences*, 489 U.S. at 470-72, 109 S. Ct. 1248.

This conclusion is further not in conflict with Second Circuit precedent offered as contrary authority. "[T]he standard . . . choice-of-law clause in the . . . [policy], on its

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[8] The *Smith Barney* court ultimately held that "when the parties chose to apply New York law, without excluding its arbitration rules from that general condition . . . the parties adopted as binding New York's rule that threshold Statute of Limitations questions are for the courts." *Id.* at 202, 623 N.Y.S.2d 800, 647 N.E.2d 1308. This negative implication, *i.e.*, that a party must expressly exclude state arbitration rules from a general choice of law clause, was rejected in *Mastrobuono*.

own, is [not] sufficient to incorporate . . . [state] law on the allocation of powers between the court and the arbitrator." *Nat'l Union Fire Ins. Co.*, 88 F.3d at 134; *Doctor's Assocs. v. Distajo*, 107 F.3d 126, 131 (2d Cir.1997) ("even the inclusion in the contract of a general choice-of-law clause does not require application of state law to arbitrability issues, unless it is clear that the parties intended state arbitration on a particular issue"). Consistent with the foregoing analysis, both cases providing this general statement involved the application of New York law, as did *Mastruono*.[9]

As § 1281.2(c) is found to be applicable, TIG argues that plaintiff's failure to raise the issue within the last year constitutes waiver. TIG further argues that the denial of plaintiff's request to stay the proceedings precludes the present motion by virtue of collateral estoppel.[10]

On August 21, 2002, TIG's motion to stay the case pending arbitration was denied as it was not apparent that

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[9] There is evidence that TIG insisted that the parties designate California as the applicable law. Although such evidence is admissible to clarify an ambiguity, *see Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 69 Cal.2d 33, 69 Cal.Rptr. 561, 442 P.2d 641, 644-45 (1968) ("Although extrinsic evidence is not admissible to add to, detract from, or vary the terms of a written contract, these terms must first be determined before it can be decided whether or not extrinsic evidence is being offered for a prohibited purpose."), it is not clear how insistence on California law would bear on interpreting the agreement to include state arbitration rules.

[10] It is unclear how the panel's decision could collaterally estop a motion to stay arbitration proceedings. As discussed above, the power to stay is discretionary and vested in the court, not the arbitrator. The fact that plaintiff first sought a stay from the arbitration panel has no apparent preclusive effect on its ability to seek the same through authority specifically allocated to the court under California law. As such, and as the matter is procedural rather than substantive, placing the issue outside the normal adjudication accorded preclusive effect, the matter need not be discussed further.

arbitration would provide a more expeditious resolution than would litigation, nor was it apparent that arbitration would address all issues involved herein. At the time the denial issued, it was possible an award would issue prior to February 20, 2003, which might facilitate a resolution to non-arbitrable issues in the third-party complaint. According to TIG, the arbitration proceedings will not conclude until August 2003, after which the panel has sixty days, barring any extensions, to issue an award. As the present case likely will proceed to trial contemporaneously with the arbitration award, there now is a very real possibility that the two judgments, both involving comparable substantive issues, will issue simultaneously, precluding any efforts to introduce one judgment to another proceeding. As such, if defendant establishes fraud on the part of TIG at trial, and TIG prevails in arbitration, plaintiff may find itself in the unenviable position of covering TIG but losing reinsurance for such losses.[11] Given the substance of the denial of TIG's motion to stay one year ago indicating efficient resolution of claims was paramount, and in light of present facts, plaintiff did not waive its right to move to stay arbitration proceedings through its delay.

III. CONCLUSION

Plaintiff's motion to stay (Doc. No. 247) is granted.

SO ORDERED.

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[11] Contrary to TIG's position, it is neither inconsistent nor unjust to deny its motion to stay based on inherent authority then to grant plaintiff's motion one year later based on facts that have developed over the course of the past year.

APPENDIX C

Franklin D. Haftl
Reinsurance Consulting—Arbitration Services

May 26, 2003 R.S.V.P. _____

Interim Final Award

To: Mr. David J. Grais, Esq.—Dewey Ballantine, LLP Attorney for the Respondent.

Mr. Harry P. Cohen, Esq.—Cadwalader, Wickersham & Taft, Attorney for the Petitioner

In the Matter of the Arbitration between

TIG Insurance Company, Petitioner

And

Security Insurance Company of Hartford, Respondent

Regarding Respondents: *Motion for an Order Staying this Arbitration Pending the Trail of the Related Matters*

The panel of Arbiters having received a Brief from Respondent on the Motion to Stay dated May 5, 2003, a reply Brief from on the Motion to Stay from the Petitioner dated May 14, 2003 and a sur-reply Brief from Respondent, along with attached exhibits thereto, convened a conference call on Monday, May 26, 2003 to consider the arguments of the parties presented to the arbiters in their respective briefs.

The panel having fully discussed the presentations by the parties on the *Motion to Stay*, by a majority of the Panel, the *Motion to Stay the Arbitration Pending a Trial of the Related Matters is Denied.*

Signed on behalf of the Majority of the Panel

/s/ Franklin D Haftl
FRANKLIN D HAFTL
Dated May 26, 2003

Cc; Dennis C. Gentry, Arbiter, Robert Mangino, Sr. Arbiter, Mark B. Holton, Esq. Gibson, Dunn & Crutcher, LLP

The Award sent by e-mail and signed Hard Copy

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THURGOOD MARSHALL UNITED STATES COURTHOUSE
40 FOLEY SQUARE
NEW YORK, NY 10007

[Filed May 20, 2004]

Roseann B. MacKechnie
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 20th day of May two thousand four.

SECURITY INSURANCE COMPANY OF
HARTFORD,
Plaintiff-Appellee,

TRUSTMARK INSURANCE COMPANY,
Defendant-Third-
Party-Plaintiff-Appellee

v.

Docket No. 03-7773

TIG INSURANCE COMPANY,
Third-Party-Defendant-
Appellant.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant TIG Insurance Company.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Roseann B. MacKechnie, Clerk
By: /s/ Arthur M. Heller
ARTHUR M. HELLER
Motions Staff Attorney

APPENDIX E

STATUTORY PROVISIONS

9 U.S.C. § 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

(July 30, 1947, c. 392, 61 Stat. 670.)

Cal. Civ. Proc. Code § 1281.2. Order to arbitrate controversy; petition; determination of court

On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that:

(a) The right to compel arbitration has been waived by the petitioner; or

(b) Grounds exist for the revocation of the agreement.

(c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact. For purposes of this section, a

pending court action or special proceeding includes an action or proceeding initiated by the party refusing to arbitrate after the petition to compel arbitration has been filed, but on or before the date of the hearing on the petition. This subdivision shall not be applicable to an agreement to arbitrate disputes as to the professional negligence of a health care provider made pursuant to Section 1295.

If the court determines that a written agreement to arbitrate a controversy exists, an order to arbitrate such controversy may not be refused on the ground that the petitioner's contentions lack substantive merit.

If the court determines that there are other issues between the petitioner and the respondent which are not subject to arbitration and which are the subject of a pending action or special proceeding between the petitioner and the respondent and that a determination of such issues may make the arbitration unnecessary, the court may delay its order to arbitrate until the determination of such other issues or until such earlier time as the court specifies.

If the court determines that a party to the arbitration is also a party to litigation in a pending court action or special proceeding with a third party as set forth under subdivision (c) herein, the court (1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or special proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or special proceeding.

(Added by Stats.1961, c. 461, p. 1541, § 2. Amended by States.1978, c. 260, p. 543, § 1.)

APPENDIX F

ARBITRATION AGREEMENT CONTAINED IN WORKERS COMPENSATION UNDERLYING FIRST, SECOND, AND THIRD EXCESS OF LOSS REINSURANCE AGREEMENT

* * * *

ARTICLE XVII

ARBITRATION

As a condition precedent to any right of action hereunder, any irreconcilable dispute between the parties to this Agreement shall be submitted for decision to a board of arbitration composed of two arbitrators and an umpire meeting a place to be agreed by the board.

Arbitration shall be initiated by the delivery of a written notice of demand for arbitration by one party to the other within a reasonable time after the dispute has arisen.

The members of the board of arbitration shall be active or retired, disinterested officials of insurance or reinsurance companies, or Underwriters at Lloyd's, London, not under the control or management of either party to this Agreement. Each party shall appoint its arbitrator, and the two arbitrators shall choose an umpire before instituting the hearing. If the respondent fails to appoint its arbitrator within four weeks after being requested to do so by the claimant, the latter shall also appoint the second arbitrator. If the two arbitrators fail to agree upon the appointment of an umpire within four weeks after their nominations, each of them shall name three of whom the other shall decline two, and the decision shall be made by drawing lots. The claimant shall submit its initial brief within 45 days from appointment of the umpire. The respondent shall submit its brief within 45 days thereafter,

and the claimant may submit a reply brief within 30 days after filing of the respondent's brief.

The board shall make its decision with regard to the custom and usage of the insurance and reinsurance business. The board shall issue its decision in writing based upon a hearing in which evidence may be introduced without following strict rules of evidence but in which cross-examination and rebuttal shall be allowed. The board shall make its decision within 60 days following the termination of the hearings unless the parties consent to an extension. The majority decision of the board shall be final and binding upon all parties to the proceeding. Judgment may be entered upon the award of the board in any court having jurisdiction.

Each party shall bear the expense of its own arbitrator and shall jointly and equally bear with the other party the expense of the umpire. The remaining costs of the arbitration proceedings shall be allocated by the board.

* * * *

(2)

Supreme Court, U.S.
FILED
AUG 19 2004
OFFICE OF THE CLERK

No. 04-49

IN THE

Supreme Court of the United States

TIG INSURANCE COMPANY,

Petitioner,

v.

SECURITY INSURANCE COMPANY OF HARTFORD;
TRUSTMARK INSURANCE COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR RESPONDENT SECURITY INSURANCE COMPANY OF HARTFORD IN OPPOSITION

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QUESTION PRESENTED

Section 1281.2(c)(4) of the California Civil Procedure Code permits a court to stay an arbitration pending resolution of a related court action. Recognizing that "the interpretation of private contracts is ordinarily a question of *state* law," this Court in *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. 468 (1989) (emphasis added), held that California law governs whether a California choice-of-law provision incorporates California arbitration rules such as Section 1281.2(c)(4), and that neither the Federal Arbitration Act nor the federal policy favoring arbitration requires a choice-of-law provision to be read to *exclude* Section 1281.2(c)(4) from a choice-of-law provision. *Id.* at 476.

The arbitration agreement in this case contains a California choice-of-law provision. The district court and court of appeals held that, under California law, this choice-of-law provision incorporates Section 1281.2(c)(4), and that—as this Court squarely held in *Volt*—neither the FAA nor the federal policy favoring arbitration compelled a different interpretation. The question presented is whether the court of appeals correctly interpreted and applied California law in construing the parties' choice-of-law provision.

PARTIES TO THE PROCEEDINGS

The caption contains the names of all of the parties.

RULE 29.6 STATEMENT

The parent company of respondent Security Insurance Company of Hartford is Royal & SunAlliance Insurance Group plc, a publicly traded company.

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Cal. Civ. P. Code § 1281.2 ..... *passim*

BRIEF FOR RESPONDENT SECURITY INSURANCE COMPANY OF HARTFORD IN OPPOSITION

Respondent Security Insurance Company of Hartford respectfully submits this brief in opposition to the certiorari petition filed by TIG Insurance Company.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 360 F.3d 322 (2d Cir. 2004). The opinion and order of the district court granting respondent Security Insurance Company of Hartford's motion to stay the arbitration (Pet. App. 13a-28a) is reported at 283 F. Supp. 2d 602 (D. Conn. 2003).

JURISDICTION

The judgment below was entered on March 2, 2004. Pet. App. la. A petition for rehearing, with a suggestion for rehearing *en banc*, was denied on May 20, 2004. Pet. App. 31a-32a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. The Reinsurance Agreement. In 1998, petitioner TIG Insurance Company ("TIG") purchased through WEB Management LLC ("WEB") reinsurance for its workers' compensation policies. WEB was an agent for respondent Trustmark Insurance Company ("Trustmark"), which had authorized WEB to issue reinsurance contracts on its behalf.

For licensing reasons not relevant here, Trustmark could not reinsure 100% of TIG's exposure under its workers' compensation policies. To make the reinsurance it was marketing more attractive, WEB recruited respondent Security Insurance Company of Hartford ("Security") to act as a "fronting company" for Trustmark. Under this

arrangement, WEB would issue a reinsurance contract to TIG (on behalf of Security) that covered 100% of TIG's exposure under its workers' compensation policies. WEB would simultaneously issue (on behalf of Trustmark) a "retrocessional" reinsurance contract to Security that would cover most of Security's liability to TIG.

In 1999, TIG cancelled its 1998 policy and replaced it with a new policy (the "Reinsurance Agreement") issued by WEB on behalf of Security. Thereafter, WEB issued a retrocessional reinsurance contract (the "Retrocession Agreement") to Security on behalf of Trustmark.

In negotiating the Reinsurance Agreement, TIG insisted that it be made subject to California law. Article XVIII ("Governing Law") of the Reinsurance Agreement accordingly provides:

> This Agreement shall be governed by and construed according to the laws of the state of California, except as to rules regarding credit for reinsurance in which case the rules of all applicable states shall pertain thereto. Notwithstanding the foregoing, in the event of a conflict between any provision of this Agreement and the laws of the domiciliary state of any company intended to be reinsured hereunder, that domiciliary state's laws shall prevail.

Pet. App. 2a. The Reinsurance Agreement also provides for arbitration of "any irreconcilable dispute between the parties to this Agreement." Pet. App. 35a. The Retrocession Agreement does not contain an arbitration clause.

B. The Dispute And Federal Court Action. TIG's workers' compensation policies suffered large losses that, under the Reinsurance and Retrocession Agreements, flowed from TIG through Security to Trustmark. Rather than honor its reinsurance obligations, Trustmark asserted that TIG had

fraudulently induced the Reinsurance Agreement by making material misrepresentations to Security through WEB, and it rescinded the Retrocession Agreement. The next day, Security filed suit against Trustmark in the United States District Court for the District of Connecticut (the "federal court action"), seeking a declaration that the Retrocession Agreement was valid and enforceable. Trustmark was granted leave to add TIG as a third-party defendant in the federal court action.

C. The Arbitration. With Trustmark refusing to pay Security's claims under the Retrocession Agreement, Security in turn suspended its payments to TIG and requested that TIG provide information necessary for Security to investigate Trustmark's allegations. TIG, in turn, initiated arbitration against Security. In its arbitration demand, TIG sought a declaration that the Reinsurance Agreement was valid and enforceable and that TIG had not fraudulently induced it. The day after it filed for arbitration, TIG moved to stay the federal court action pending the outcome of the arbitration. The district court denied that motion.

The arbitration panel scheduled the arbitration hearing for August 2003, whereas the district court scheduled a tentative trial date in October 2003. Prompted by the recognition that it could be subjected to inconsistent rulings in the two proceedings, Security moved the arbitration panel to postpone the arbitration until after the trial in the federal court action. Pet. App. 28a. The panel denied that motion without explanation. Pet. App. 29a.

D. The Decisions Below. On June 4, 2003, Security moved the district court to stay the arbitration pending completion of the federal court action. Security contended that the choice-of-law provision in the Reinsurance Agreement reflected the parties' intention to incorporate California arbitration law—including Cal. Civ. Proc. Code

§ 1281.2(c)(4), which authorizes courts to stay an arbitration pending resolution of a related court action.[1]

The district court granted the motion. Pet. App. 28a. Relying on this Court's decision in *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. 468 (1989)—which involved the identical California statute—the district court recognized that "[t]here is no federal policy favoring arbitration under a certain set of procedural rules" (283 F. Supp. 2d at 605 (quoting *Volt*, 489 U.S. at 476)) and that "[i]f the parties so intend it," state arbitration rules will govern the parties' arbitration, because private parties have the "ability to contract around the FAA." *Id.* at 607-08. The district court reasoned that because "'the interpretation of private contracts is ordinarily a question of state law'" (283 F. Supp. 2d at 607 (quoting *Volt*, 489 U.S. at 474)), and because "state law provides the tools by which the intent of the parties is ascertained," the case was controlled by "fundamental principles of contract interpretation under . . . California state law." *Id.* After exhaustively reviewing California authorities (*see id.* at 607-10), the district court determined that the parties had intended to incorporate state arbitration rules such as Cal. Civ. Proc. Code § 1281.2(c)(4) as part of their arbitration agreement.

The district court rejected TIG's contention that *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), compelled a different result, noting that *Mastrobuono* turned on "the proper application of New York law," not California law, and that the state law arguably incorporated into the arbitration agreement by the choice-of-law clause at

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[1] Section 1281.2(c)(4) provides in relevant part that "[i]f the court determines that a party to the arbitration is also a party to litigation in a pending court action or special proceeding with a third party . . . the court . . . (4) may stay arbitration pending the outcome of the court action or special proceeding."

issue in *Mastrobuono* was hostile to arbitration, whereas Cal. Civ. Proc. Code § 1281.2, as this Court ruled in *Volt*, did not "'undermine the goals or policies of the FAA,'" but instead "'foster[ed] the federal policy favoring arbitration.'" 283 F. Supp. 2d at 610 (quoting *Volt*, 489 U.S. at 472).

The court of appeals affirmed.[2] Like the district court, the court of appeals recognized that, under *Volt*, the key question was "whether the choice-of-law provision reveals the intention of TIG and Security to incorporate California's procedural arbitration rules . . . into the contract"—a question governed by "California law." Pet. App. 7a. Like the district court, the court of appeals also concluded that "the California Supreme Court would rule that the choice-of-law provision did incorporate the state's procedural rules for arbitration." *Id.* at 11a. And like the district court, the court of appeals rejected TIG's suggestion that *Mastrobuono* "altered *Volt*'s directive with regard to analyzing choice-of-law clauses," because *Mastrobuono* involved "New York not California law" and because the state arbitration rule at issue in *Mastrobuono* placed "restrictions on the parties' substantive rights," whereas Cal. Civ. Proc. Code § 1281.2(c)(4), as this Court held in *Volt*, was fully consistent with federal arbitration policy.

ARGUMENT

The decision below is a straightforward and faithful application of this Court's arbitration precedents. In *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. 468 (1989), this Court expressly held that *state* law determines whether a choice-of-law provision incorporates a state arbitration rule such as

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[2] The district court entered its decision on August 5, 2003. The next day, TIG appealed the order and asked the Second Circuit to stay proceedings in the district court pending disposition of the appeal. The court of appeals granted the stay, which was dissolved in connection with the court's disposition of the merits.

California Civil Procedure Code § 1281.2(c)(4), and that neither the Federal Arbitration Act nor the liberal federal policy favoring arbitration bars a court from construing a general choice-of-law provision to incorporate such a state arbitration rule.

This Court's decision in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), did not purport to undermine *Volt*. In *Mastrobuono*, this Court applied New York law to a brokerage agreement and concluded that a choice-of-law provision did not—given the particular ambiguities in the contract in question—incorporate a New York rule precluding an arbitrator from awarding punitive damages. *Mastrobuono* was grounded entirely in the particular terms of the contract before the Court; it did *not* usher in a new rule of *federal* law that prohibits courts from construing choice-of-law provisions to encompass state arbitration rules.

In this case, the court of appeals concluded that, as a matter of California law, the choice-of-law provision at issue here incorporates California arbitration rules, including Section 1281.2(c)(4). That holding rested squarely on the court of appeals' construction of California law. The court of appeals also held that its interpretation of the choice-of-law provision was fully consistent with the FAA. That holding is entirely sound—indeed, it is *precisely* the same holding, regarding the *same* incorporated state law rule, reached by this Court in *Volt*. Because *Mastrobuono* did not purport to modify *Volt* and otherwise says nothing about how the contract at issue in *this* case should be interpreted, the court of appeals correctly concluded that *Mastrobuono* did not compel a different result. The decision below is entirely in accord with this Court's precedents.

Petitioner's claim that there is a "deep and persistent conflict" among the lower courts over whether "a general choice-of-law provision incorporates state-law arbitration

rules" (Pet. 14) is overblown and inaccurate. The lower courts have not reached conflicting decisions on the scope of choice-of-law provisions because of any disagreements over *federal* law. The various purported "conflicts" recited by the petition arise because the lower courts in those cases, following the teachings of *Volt* and *Mastrobuono*, applied *different* bodies of state contract law to *different* arbitration agreements. These "conflicts" do not warrant this Court's attention, because "this Court does not sit to review" questions of state law. *Volt*, 489 U.S. at 474; *see also Dixon v. Duffy*, 344 U.S. 143, 144 (1952) ("This Court, of course, does not sit to determine matters of state law.").

Moreover, this case does not, as petitioner contends, involve a "general" choice-of-law clause. As the court of appeals recognized, the choice-of-law provision in the Reinsurance Agreement contains express exceptions that make California law *in*applicable in certain circumstances, suggesting that, had the parties intended *not* to be bound by California arbitration rules, they would have said so explicitly. Pet. App. 11a. The inferences that can be drawn about the parties' intent from such a provision differ fundamentally from the inferences that can be drawn from a "general" choice-of-law clause. Accordingly, this case does not conflict with those decisions cited in the petition that involve "*general* choice-of-law provision[s]." Pet. (i) (emphasis added).

In any event, even if the cases petitioner cites *could* be read as holding that *Mastrobuono* announced a new *federal* rule of contract interpretation applicable to choice-of-law provisions, no conflict exists that would warrant this Court's review. The lower courts that have taken a more circumscribed view of choice-of-law provisions were motivated by the concern that the particular state arbitration rules that were claimed to be incorporated by a choice-of-law provision would, as in *Mastrobuono*, be preempted by the

FAA if the state rule applied of its own force, rather than by virtue of a choice-of-law clause. That concern is not present here, because this Court has already determined that the California statute at issue here is fully consistent with the FAA. As this Court recognized in *Volt*, Cal. Civ. Proc. Code § 1281.2(c)(4) "foster[s] the federal policy favoring arbitration." 489 U.S. at 488 & n.5. Indeed, this Court has *repeatedly* reaffirmed that conclusion. *See EEOC v. Waffle House*, 534 U.S. 279, 294 & n.9 (2002); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996). The decision below therefore does not "conflict" with decisions in which courts have held that other choice-of-law provisions do not incorporate state arbitration rules that are contrary to federal arbitration policy.

The petition should be denied.

I. The Decision Below Correctly Applies This Court's Decisions In *Volt* And *Mastrobuono*.

The court of appeals' determination that the parties' choice-of-law provision incorporates Cal. Civ. Proc. Code § 1281.2(c)(4) represents an entirely appropriate application of this Court's decisions in *Volt* and *Mastrobuono*.

1. *Volt* required this Court to decide whether the inclusion of a choice-of-law provision in an arbitration agreement expressed the parties' intention to be governed by a state rule of arbitration (in particular, Cal. Civ. Proc. Code § 1281.2(c)(4), the same provision at issue in this case), and, if so, whether the FAA or the federal policy favoring arbitration preempted the state arbitration law rule. The case came to the Court on appeal from a California Court of Appeal, which had held that the parties had agreed to be bound by California arbitration rules and that Section 1281.2(c)(4) was not preempted by the FAA.

With respect to the first issue, the Court declined to revisit the California Court of Appeal's determination that

the choice-of-law clause incorporated Section 1281.2(c)(4), noting that "the interpretation of private contracts is ordinarily a question of state law." 489 U.S. at 474-75. The Court then went on to consider whether the California "Court of Appeal's construction of the choice-of-law clause . . . violates the settled federal rule that questions of arbitrability in contracts subject to the FAA must be resolved with a healthy regard for the federal policy favoring arbitration." *Id.* at 475 (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)).[3]

The Court found no conflict between the Court of Appeal's interpretation of the choice-of-law clause and the *Moses H. Cone* principle. *See* 489 U.S. at 476. Indeed, the Court stated that it would be inimical to the purposes of the FAA to deny the parties the ability to choose the terms under which they will arbitrate, because under the FAA, "parties are generally free to structure their arbitration agreements as they see fit." *Id.* at 479. As the Court concluded:

> Interpreting a choice-of-law clause to make applicable state rules governing the conduct of arbitration—rules which are manifestly designed to encourage resort to the arbitral process—simply does not offend the rule of liberal construction set forth in *Moses H. Cone*, nor does it offend any other policy embodied in the FAA.

489 U.S. at 476. The same reasons also led the Court to conclude that Section 1281.2(c)(4) was not preempted by the FAA. *Id.* at 480.

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[3] This rule mandates that "in applying general state-law principles of contract interpretation to the interpretation of an arbitration agreement within the scope of the Act . . . , due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration." *Id.* at 475-76 (citing *Perry v. Thomas*, 482 U.S. 483, 493 n.9 (1987)).

2. *Mastrobuono*, by contrast, addressed whether, under New York law, a choice-of-law provision in an arbitration agreement between a securities broker-dealer and its customers incorporated a New York law (the *Garrity* rule) that precluded arbitrators from awarding punitive damages. 514 U.S. at 53-54. The parties' agreement called for arbitration to be conducted pursuant to NASD rules, which authorize arbitrators to award punitive damages, but the choice-of-law provision's incorporation of the *Garrity* rule would have foreclosed such relief. *See id.* at 54-55.

Confronted with this ambiguity, the Court turned to state-law principles of contract interpretation to determine "what the contract has to say." 514 U.S. at 58. Indeed, the Court called attention to the fact that it applied "precedent from Illinois, the forum State and place where the contract was executed, and New York, the State designated in the contract's choice-of-law clause," because "[t]he parties suggest no other State's law as arguably relevant to this controversy." *Id.* at 63 n.9.

Applying the state-law principles that ambiguities in the contract should be construed against the drafter, and that a contract "should be read to give effect to all of its provisions and to render them consistent with each other," the Court concluded that the choice-of-law provision could not be read as expressing a clear intent to incorporate the *Garrity* rule without creating an inconsistency with the contract's reference to NASD rules. *Id.* at 64 (this "reading sets up the two clauses in conflict with one another: one foreclosing punitive damages, the other allowing them. This interpretation is untenable.") Only by interpreting the choice-of-law provision to incorporate New York's substantive law, and not its arbitration law, could all of the contract's provisions be given meaning and rendered consistent with one another. *Id.* at 64. The Court observed that this approach was consistent with the *Moses H. Cone*

principle of construing arbitration agreements with "due regard" for the "federal policy favoring arbitration." 514 U.S. at 62.[4]

3. In the court below, petitioner contended that *Mastrobuono* modified *Volt* by declaring—as a matter of *federal* law—that a general choice-of-law clause does not incorporate state arbitration rules. That contention is incorrect. *Mastrobuono* applied state-law contract principles to interpret the agreement before it; it did not usher in a new federal principle that displaces the role of state law in interpreting choice-of-law provisions.

To be sure, *Mastrobuono* and *Volt* reach different "outcomes" in that *Volt* determined that a choice-of-law clause incorporated a state arbitration rule, whereas *Mastrobuono* concluded that the choice-of-law clause in that case did not. But these outcomes are attributable entirely to the differences in the contracts before the Court and the requirements of the different state-law principles applicable to them. Indeed, *Mastrobuono* expressly recognized the primacy of state law in interpreting choice-of-law provisions by noting that *Volt* properly deferred to the California Court of Appeal's construction of the choice-of-law provision—a deference that would have been *inappropriate* if contract interpretation were a matter of federal law. This Court

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[4] Although the Court's ruling ultimately turned on state-law questions of contract interpretation, this Court did not grant certiorari on those issues. Rather, the court of appeals' ruling that this Court accepted for review appeared to raise a significant question of *federal* law—*i.e.*, whether parties may, by contract, override rules promulgated by the NASD. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 20 F.3d 713 (7th Cir. 1994). Upon closer inquiry, this Court concluded that the particular NASD rule at issue had not yet been promulgated at the time of the relevant events. *Mastrobuono*, 514 U.S. at 61 n.6 (noting that NASD Rule 21(f)(4) is "not applicable to this case"); Brief for the United States and SEC as *Amici Curiae*, at 7 (noting that because Rule 21(f)(4) was not yet effective, "[t]his case consequently presents a question of contract interpretation, not of preemption by federal securities law").

recently reaffirmed this conclusion in stating that "*Volt* and *Mastrobuono* both direct courts to respect the terms of the agreement *without* regard to the federal policy favoring arbitration." *Waffle House*, 534 U.S. at 294 & n.9 (emphasis added).

In the decision below, the court of appeals correctly adhered to these principles. It applied California law to determine whether the parties' choice-of-law provision incorporated Cal. Civ. Proc. Code § 1281.2(c)(4) (Pet. App. 21a-26a), and—following this Court's holding in *Volt*—concluded that neither the FAA nor the federal policy favoring arbitration compelled a different result. That decision is unassailably correct.

II. The Decision Below Does Not Conflict With The Decisions Of Other Federal Courts On An Issue Of Federal Law.

1. In the wake of *Volt* and *Mastrobuono*, the lower courts have consistently consulted state law to determine whether choice-of-law provisions set forth in arbitration agreements governed by the FAA incorporate state arbitration standards. Not surprisingly, given variations in state law and in the relevant contractual language across these cases, the lower courts have reached different conclusions about whether a choice-of-law clause in any particular case has the effect of incorporating state arbitration rules.

The petition contends that these differences evidence a "deep" and "mature" conflict on an issue of *federal* law regarding "general" choice-of-law clauses. But that contention is inaccurate: the "conflicts" recited in the petition have nothing to do with federal law. Instead, these differences reflect the inevitable result of federal courts applying different *state* laws to the particular contractual language used by the parties in any given case to express

their intentions, and do not raise any issue worthy of this Court's attention. *See Dixon*, 344 U.S. at 144. Indeed, even if petitioner's premise were correct, this case would not be an appropriate vehicle to resolve the alleged "conflict," since—as the court below recognized—there is nothing "general" about the uniquely broad and well-defined choice-of-law provision at issue here.

For example, the petition prominently features *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205 (9th Cir. 1998), as a decision that "conflicts" with the decision below on a question of federal law. *See* Pet. 16. Indeed, the petition breathlessly asserts that "*Wolsey* underscores the importance of the conflict among the courts of appeals" because it held that a California choice-of-law provision did *not* incorporate Section 1281.2(c) of the California Civil Procedure Code—"the very same California statute at issue in this case." Pet. 17. But the asserted "conflict" between *Wolsey* and the decision below rests entirely on a disagreement about the meaning of California law.

Like the court of appeals in this case, *Wolsey* expressly applied "ordinary state-law principles" (144 F.3d at 1210) to interpret the parties' agreement.[5] Indeed, *Wolsey* criticized the district court for relying on the parties' post-dispute conduct as a guide to their intentions about incorporating

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[5] As the court stated:

> In construing an arbitration agreement, courts must "apply ordinary state-law principles that govern the formation of contracts." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Under California contract law, the court must "endeavor[] to effectuate the mutual intent of the parties." *City of El Cajon v. El Cajon Police Officers' Ass'n*, 49 Cal. App. 4th 64, 56 Cal. Rptr. 2d 723, 727 (1996). The "paramount consideration" is the "parties' objective intention at the time of contracting." *Porreco v. Red Top RV Center*, 216 Cal. App. 3d 113, 264 Cal. Rptr. 609, 612 (1989).

Wolsey, 144 F.3d at 1210.

state arbitration rules, because reliance on such extrinsic evidence flouted the California principle that only acts that occur "*before* a dispute has arisen" may be relied upon as evidence of the parties' intentions at the time of contracting. *See id.* at 1211-12 (citing *Heston v. Farmers Ins. Group*, 160 Cal. App. 3d 402, 206 Cal. Rptr. 585, 591 (1984)) (emphasis in *Heston*).

What explains the difference between *Wolsey* and the decision below, therefore, is not any disagreement about the meaning of *federal* law, but about the meaning of *California* law. And in this regard, it is significant to note that *Wolsey* did not have the benefit of the subsequent decision in *Mount Diablo Medical Center v. Health Net of California, Inc.*, 101 Cal. App. 4th 711, 124 Cal. Rptr. 2d 607 (2002), upon which both the district court and court of appeals in this case so heavily relied. But whatever the reason for the disagreement, there is no need for this Court to resolve a conflict between the Ninth Circuit and the Second Circuit on a question of California law.[6]

Similarly, *Roadway Package System, Inc. v. Kayser*, 257 F.3d 287 (3d Cir. 2001), which the petition heralds as the "leading case" in the "majority" view (Pet. 15), rests on an interpretation of Pennsylvania law that, by definition, cannot "conflict" with the decision below. *Roadway* recognized that whether a choice-of-law provision incorporates state arbitration standards is "a matter of contract construction," and that contract law "is mostly state law" that "varies from

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[6] Petitioner itself has recognized that *Wolsey* turned on the Ninth Circuit's interpretation of *state* law. In its briefing in the court of appeals, petitioner urged the court to defer to the Ninth Circuit's interpretation of California law on the ground that where the circuit court in which the state in question has "essayed its own prediction of the course of state law, the federal courts of other circuits should defer to that holding." TIG Opening Br. at 19 (quotation and citation omitted). TIG's characterization of *Wolsey* in the petition is decidedly at odds with its characterization of *Wolsey* in the court below.

state to state." 257 F.3d at 293-94. *Roadway* also recognized that, in *Volt*, the Court "deferred to the California court's construction of its own State's law," whereas in *Mastrobuono* the Court construed the parties' agreement *de novo*, because it was "reviewing a federal court's construction of a choice-of-law clause." 257 F.3d at 295. *Roadway* plainly understood that the law being interpreted in *Volt* and *Mastrobuono*—whether under a "deferential" standard (as in *Volt*) or a *de novo* standard (as in *Mastrobuono*)—was *state* contract law.

Petitioner characterizes *Roadway* as holding that the interpretation of choice-of-law provisions in arbitration agreements is governed by "federal law." Pet. 15. But petitioner supports this assertion with a highly selective quotation from the decision. *Roadway* observed that, in the absence of the FAA, Pennsylvania arbitration rules undoubtedly would have governed the parties' arbitration. But the Court went on to say (in the passage cited by petitioner) that "this case is *not* governed by state law—it is governed by federal law." 257 F.3d at 294 (emphasis in original). Contrary to petitioner's contention, that assertion did not bespeak a belief that "contract construction" under the FAA is governed by federal law; it simply reflected the Third Circuit's recognition that the FAA requires arbitration agreements to be enforced according to their terms, and that those terms could incorporate either federal or state arbitration standards. But *Roadway* makes clear that ascertaining the "terms" of any particular contract is governed by *state*-law principles. 257 F.3d at 298.

Indeed, *all* of the other cases cited in the petition are appropriately and logically read as resting on the application of *state* contract law to the choice-of-law provisions in each case. These decisions purport to follow *Mastrobuono*, or to "distinguish" *Volt*, only in the sense that they engage in *de novo* review of the applicable state's contract law, which is

exactly what the district court and courts of appeals did here. *See, e.g., Action Indus., Inc. v. United States Fid. & Guar. Co.*, 358 F.3d 337, 339 (5th Cir. 2004); *Wolsey*, 144 F.3d at 1213-14; *Porter Hayden Co. v. Century Indemnity Co.*, 136 F.3d 380, 386 (4th Cir. 1998).

And that is entirely appropriate: Federal Rule of Civil Procedure 52 and *Mastrobuono* make clear that the courts of appeals *should* review *de novo* the district court's legal conclusions regarding questions of state law. *See also Salve Regina College v. Russell*, 499 U.S. 225, 231 (1991) ("We conclude that a court of appeals should review *de novo* a district court's determination of state law.") But these decisions evidence *no* conflict, let alone a "mature" conflict, on an issue of *federal* law. They stand only for the proposition that different courts applying different state laws to different contracts under different standards of review will reach different results—results that this Court does not sit to review. *Volt*, 489 U.S. at 474; *Dixon*, 344 U.S. at 144.

2. The petition also glosses over fundamental differences in the choice-of-law provisions at issue in each of the cases upon which it relies. According to petitioner, the question presented in this case is "[w]hether a *general* choice-of-law clause in a contract with an arbitration agreement that is subject to the [FAA] renders inapplicable federal arbitration rules and instead incorporates state arbitration rules." Pet. (i) (emphasis added). But the cases cited by petitioner as "conflicting" authorities do *not* all involve "general" choice-of-law provisions. Neither does this case.

For example, the choice-of-law clause in *Porter Hayden Co. v. Century Indemnity Co.*, 136 F.3d 380 (4th Cir. 1998), called for application of the "applicable common law of the states of the United States," which Porter claimed operated to incorporate Maryland arbitration principles. *Id.* at 382. Noting that this was hardly a generic arbitration clause, the

Fourth Circuit stated that "a choice-of-law provision specifying 'the applicable common law of the states of the United States would be a peculiar way indeed to say 'do not apply the Federal Arbitration Act.'" *Id.* at 383 n.5. Based on a *de novo* review of the contract, the court determined that the arbitration clause did not express an intent to apply Maryland arbitrability law.

Similarly, the choice-of-law provision in *UHC Management Co. v. Computer Sciences Corp.*, 148 F.3d 992, 995 (8th Cir. 1998), provided that the parties' agreement "shall be governed by and construed under the laws of the State of Minnesota" but only "to the extent not preempted by ERISA or other federal law." *Id.* at 994. The court of appeals opined that the fact the clause "specifically provides that Minnesota law must yield whenever preempted by federal law . . . cuts against the argument that the parties intended that the FAA not apply." *Id.*

Indeed, the choice-of-law provision in *this* case is not a "general" choice-of-law provision. The choice-of-law provision in the Reinsurance Agreement is subject to two express carve-outs: California law does *not* apply with respect to "rules regarding credit for reinsurance in which case the rules of all applicable states" apply. Pet. App. 14a. Nor does it apply with respect to any issue in which the Reinsurance Agreement and the laws of TIG's "domiciliary state" conflict, in which case the laws of the domiciliary state apply. *Id.* That the parties expressly enumerated exceptions to the choice-of-law provision—in an agreement negotiated and executed *after* this Court decided *Volt*—strongly suggests that they otherwise intended for all other California law (including state arbitration law) to apply. As the court of appeals concluded, "[i]f the parties intended for only California substantive law to govern, they could easily have made their intentions clearer with a second exclusion for California's arbitration rules." Pet. App. 11a.

The peculiarities of the choice-of-law provision in this case make it impossible to assert that the decision below conflicts with cases addressing more "generic" choice-of-law provisions, such as the one at issue in *Roadway*. Indeed, *Roadway* expressly confined itself to cases involving a generic choice-of-law clause. *See* 257 F.3d at 297 ("The case might well be different if other contractual language or other evidence suggested that the parties intended to be bound by standards borrowed from state law."). That express qualification squarely rebuts petitioner's assertion that *Roadway* "conflicts" with the decision in this case, because it is impossible to divine how the Third Circuit would construe the peculiar choice-of-law provision at issue in this case. Differences in the particularities of choice-of-law provisions have proven to be dispositive in this area, even in decisions within the same circuit.[7] The uniqueness of the arbitration clause at issue in this case makes review by this Court particularly unwarranted, because any disposition necessarily will be fact-bound and tied to the particular terms of the Reinsurance Agreement.

3. Even assuming that the authorities cited in the petition purport to interpret *Mastrobuono* as establishing a *federal* rule precluding courts from construing "general" choice-of-law clauses to incorporate state arbitration law, the decision below would not give rise to a conflict worthy of

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[7] *Compare Gateway Tech., Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993, 996 (5th Cir. 1995) (clause stating that "the arbitration decision shall be final and binding on both parties, except that errors of law shall be subject to appeal" evinced the parties' intent to depart from the FAA's vacatur standard) (emphasis omitted); *Ford v. NYLCare Health Plans of the Gulf Coast, Inc.*, 141 F.3d 243, 247 (5th Cir. 1998) (holding that a contract that specifically referred to the "Texas General Arbitration Act" expressed the parties' intent to borrow state arbitration rules), *with Action Indus., Inc. v. United States Fid. & Guar. Co.*, 358 F.3d 337, 341 (5th Cir. 2004) (holding that a choice-of-law clause stating that the law of Tennessee "shall govern the execution and performance of this agreement" did not incorporate state arbitration standards).

this Court's attention. The cases that ostensibly conflict with the decision below involve state arbitration rules that would be preempted by the FAA if the state rule applied of its own force, rather than by virtue of a choice-of-law clause. The decision below is not inconsistent with those holdings, because—as this Court squarely held in *Volt*—Section 1281.2(c) is not inconsistent with federal arbitration policy.

The Sixth Circuit's decision in *Ferro Corp. v. Garrison Industries, Inc.*, 142 F.3d 926, 929 (6th Cir. 1998), exemplifies this line of cases. The Sixth Circuit held that a choice-of-law provision did not incorporate an Ohio rule that authorized courts to resolve in the first instance a claim that the contract containing the arbitration clause was fraudulently induced. Such a state rule clearly would have been preempted if it applied of its own force, rather than by virtue of a choice-of-law provision. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967) (holding that such claims are for the arbitrator to decide). Indeed, it is difficult to imagine a state law that more squarely contradicts the FAA and its policies than a state rule precluding the arbitration of claims that the parties agreed to arbitrate. *See Doctor's Assocs.*, 517 U.S. at 688; *Southland Corp. v. Keating*, 465 U.S. 1, 31 (1984).

Similarly, in *UHC Management Co. v. Computer Sciences Corp.*, 148 F.3d 992 (8th Cir. 1998), the Eighth Circuit held that a "general" choice-of-law provision did not incorporate a state arbitration rule that subjected arbitral awards to heightened judicial review. Unlike federal law, which narrowly limits judicial review of arbitral awards (*see* 9 U.S.C. § 10), Minnesota law authorizes courts to review such awards *de novo*. *Id.* at 997. Thus, in *UHC Management Co.*, the state rule incorporated by the choice-of-law provision clearly conflicted with the FAA.

Likewise, in *Roadway*, the Third Circuit held that a "general" choice-of-law provision did not incorporate

Pennsylvania standards governing vacatur of an arbitrator's decision. As the Third Circuit recognized, the FAA and Pennsylvania's arbitration rules were in direct conflict: "[Pennsylvania's] vacatur standards for common law arbitration awards are so much narrower than the FAA's, [that] the choice of standards issue could well be *dispositive* in this case." *Roadway*, 257 F.3d at 291-92 & n.2 (emphasis added); *see also Action Indus., Inc. v. United States Fid. & Guar. Co.*, 358 F.3d 337 (5th Cir. 2004) (holding that "general" choice-of-law provision does not incorporate conflicting Tennessee vacatur standards).

All these decisions rest upon the fact that the state laws sought to be incorporated by the choice-of-law provision would have been preempted if they applied of their own force.[8] Indeed, several of these decisions have expressly predicated their holding on this fact. *See, e.g.*, *Ferro*, 142 F.3d at 934-35 ("*Volt* did not present a situation in which state and federal law were in conflict . . . In the instant case, however, . . . the relevant provisions of state law and the FAA appear to conflict.")

In contrast, this Court concluded in *Volt* that Cal. Civ. Proc. Code § 1281.2(c)(4) does not "undermine the goals and policies of the FAA" and that it "generally foster[s] the federal policy favoring arbitration." *Volt*, 489 U.S. at 477-78 & n.8. And it has repeatedly reaffirmed that conclusion. *See*

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[8] *See, e.g., Porter Hayden Co. v. Century Indemnity Co.*, 136 F.3d 380 (4th Cir. 1998) (holding that choice-of-law provision did not incorporate a Maryland rule that required courts to decide in the first instance whether claims are time-barred, because that rule conflicted with federal law); *PaineWebber Inc. v. Elahi*, 87 F.3d 589 (1st Cir. 1996) (reaching similar conclusion with respect to a New York law requiring courts to address limitations defenses in the first instance); *Kelley v. Michaels*, 59 F.3d 1050 (10th Cir. 1995) (holding that general choice-of-law provision does not incorporate New York's *Garrity* rule); *Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266 (9th Cir. 2002) (holding that choice-of-law provision did not incorporate state waiver rules that conflicted with federal law).

Doctor's Assocs., 517 U.S. at 688 (describing Section 1281.2(c)(4) as a rule that "determined only the efficient order of proceedings" but did not "affect the enforceability of the arbitration agreement itself"); *Waffle House*, 534 U.S. at 294 & n.5.

Thus, granting review in this case would do nothing to alleviate the purported "conflict" identified by petitioner. This Court has already held that it does not sit to review the very question of *state* law that petitioner challenges here, and it has likewise already concluded that "[i]nterpreting a choice-of-law clause to make applicable state rules governing the conduct of arbitration [such as Cal. Civ. Proc. Code § 1281.2(c)] . . . does not offend the rule of liberal construction set forth in *Moses H. Cone* . . . [or] . . . any other policy embodied in the FAA." *Volt*, 489 U.S. at 476. Even assuming that petitioner has identified a conflict involving *federal* law, that conflict focuses on whether "general" choice-of-law clauses incorporate state arbitration rules that conflict with the FAA. Because this case involves neither a "general" choice-of-law provision nor a state arbitration rule that conflicts with federal arbitration policy, this case is not a suitable vehicle for addressing that question.

III. Petitioner's Claim That The Court Of Appeals Should Have Deferred To The Arbitrator's Decision Does Not Raise Any Issue On Which The Circuits Have Divided And Otherwise Lacks Merit.

The petition also contends that review by this Court is warranted because the decision below "conflicts with decisions of this Court and the other courts of appeals holding that issues of contract interpretation should be made by, or determined with deference to, the arbitral panel." Pet. 26. But contrary to petitioner's suggestion, the circuits have *not* divided on these questions. Indeed, none of the cases cited by the petition (Pet. 29) even arguably addresses them.

In *Bailey v. Ameriquest Mortgage Co.*, 346 F.3d 821 (8th Cir. 2003), for example, the Eighth Circuit held that an arbitrator should decide in the first instance whether certain remedial limitations set forth in an arbitration agreement are enforceable, where the arbitration agreement in question gave the arbitrator "exclusive authority to resolve" disputes over the validity of any part of the agreement. *Id.* at 822. The Eleventh Circuit in *Anders v. Hometown Mortgage Services, Inc.*, 346 F.3d 1024 (11th Cir. 2003), held that arbitrators and not courts should decide "the validity of the remedial restriction provisions" in the parties' arbitration agreement. *Id.* at 1032. And in *Pedcor Management Company, Inc. Welfare Benefit Plan v. Nations Personnel of Texas, Inc.*, 343 F.3d 355 (5th Cir. 2003), the Fifth Circuit concluded that arbitrators rather than courts should decide in the first instance whether class arbitration is "available or forbidden" under the parties' arbitration agreement. *Id.* at 363.

These cases simply have nothing to do with whether an arbitrator rather than a court should determine in the first instance whether the parties' choice-of-law provision incorporates a state-law rule, such as Cal. Code. Proc. § 1281.2, authorizing courts to stay arbitration pending resolution of related litigation. Nor do they address whether courts should defer to an arbitrator's determination regarding whether a choice-of-law clause incorporates state arbitration rules. Petitioner's claim that a "conflict" exists does not withstand even mild scrutiny.

It also is far from clear that these questions are properly presented in *this* case. TIG did not raise the claim that the arbitrator's ruling on Security's stay motion was entitled to "deference" until it filed a petition for rehearing in the court of appeals. Neither the district court nor the court of appeals addressed it. Moreover, the arbitrators *never* decided (one way *or* the other) whether the Reinsurance Agreement incorporates California arbitration law. Security did not

predicate its stay request *to the arbitration panel* on California Civil Procedure Code § 1281.2, as that section authorizes *courts* to stay arbitration pending resolution of related litigation. Instead, it based its stay request on pragmatic case management considerations. The arbitral panel denied the stay request without explanation. Thus, no arbitral determination was *ever* made on the issue whether the choice-of-law provision incorporates Section 1281.2—and thus there is no arbitral decision to which deference could conceivably be owed.

Petitioner's contention that the arbitrators should decide such issues in the first instance, or that their decisions on such issues are entitled to deference, is also inconsistent with this Court's precedents. The very purpose of Section 1281.2 is to provide a mechanism through which parties can *defer* arbitration while related litigation remains pending. It is logical to assume that the parties would have intended to have a court resolve disputes about the validity of such a stay provision, because referring the decision to an arbitrator would, by definition, eviscerate the protections the provision was intended to provide—*i.e.*, it would *require* the parties to initiate proceedings in an arbitral forum at the same time they are litigating in a judicial forum.

It is precisely these types of issues that courts—*not* arbitrators—should decide in the first instance. As this Court recognized in *Howsam v. Dean Witter Reynolds*, 537 U.S. 79 (2002), courts should decide "gateway issues of arbitrability" where the "contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought . . . that an arbitrator would do so," and "where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate." *Id.* at 83-84; *see also First Options*, 514 U.S. at 941 (same). Those considerations plainly apply here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

TIG INSURANCE COMPANY,

Petitioner,

v.

SECURITY INSURANCE COMPANY OF HARTFORD;
TRUSTMARK INSURANCE COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF

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REPLY BRIEF

In its petition, TIG Insurance Company ("TIG") established that, in light of this Court's decisions in *Mastrobuono* and *Volt*, a conflict has arisen among the circuits on the issue whether a generic choice-of-law clause renders the Federal Arbitration Act ("FAA") inapplicable and thereby imposes state arbitration rules on the parties. Pet. 3-6. TIG identified the cases adopting the majority position held by the First, Third, Fourth, Fifth, Sixth, Eighth, Ninth and Tenth Circuits, and the minority view held by the D.C. Circuit and Second Circuit in this case, *id.* at 15-20, and showed that this case implicates that conflict because the court below could not have concluded that California law governed arbitration under the majority rule, *id.* at 20-22. TIG also showed that the decision below misread *Mastrobuono*, *id.* at 24-25, unduly limited the scope of the FAA envisioned by Congress, *id.* at 22-23, and improperly construed the contract without regard for the views of the arbitral panel, *id.* at 26-29.

Respondent disputes each of these conclusions, but does nothing to undermine any of them. Respondent insists that the "lower courts have not reached conflicting decisions on the scope of choice-of-law provisions because of any disagreements over *federal* law," but instead have conflicted based on "*different* bodies of state contract law." Opp. 7. It argues that the leading case, *Roadway Package System, Inc.* v. *Kayser*, 257 F.3d 287 (3d Cir. 2001), "rests on an interpretation of Pennsylvania law that, by definition, cannot 'conflict' with the decision below." Opp. 14.

Respondent's argument is baffling because the Third Circuit could not have been clearer on this issue:

> No one contests that were this matter governed by state law, then the relevant rule would be supplied by the laws of the Commonwealth of Pennsylvania. But, as we have

> explained, this case is *not* governed by state law—it is governed by federal law.

257 F.3d at 294 (emphasis in original). Since then, the Fifth and Ninth Circuits have expressly adopted the analysis in *Roadway*. See *Action Indus., Inc.* v. *United States Fid. & Guar. Co.*, 358 F.3d 337, 341-43 (5th Cir. 2004); *Sovak* v. *Chugai Pharm. Co.*, 280 F.3d 1266, 1269 (9th Cir. 2002). Indeed, *all* of the cases adopting the majority rule are predicated *not* upon a review of state-law contract cases, but upon an analysis of this Court's decision in *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). See note 2, *infra*. To be sure, the court below and the D.C. Circuit disagree with the majority, holding that *state* law provides the exclusive rule for decision in these circumstances. Pet. App. 8a; *Ekstrom* v. *Value Health Inc.*, 68 F.3d 1391, 1395 (D.C. Cir. 1995). Resolution of these competing views on an issue that the district court and court of appeals recognized as "troubling" and "recurring," Pet. App. 1a, 18a, plainly is something that this Court does "'sit to review.'" Opp. 7 (quoting *Volt Info. Scis., Inc.* v. *Board of Tr.*, 489 U.S. 468, 474 (1989)); see Sup. Ct. R. 10.

Respondent is left to argue that this case is a "not a suitable vehicle" because the choice-of-law clause is not "generic." Opp. 18 & 21. That argument is at war with the ruling respondent seeks to defend. The court below purported to apply cases construing "generic" choice-of-law provisions to *this* case because "generic" means, in this context, a choice-of-law provision that does "not mention arbitration." Pet. App. 10a; see *Roadway*, 257 F.3d at 297 & n.5. This case—which involves a "generic" choice-of-law provision that says nothing about arbitration—is thus an ideal vehicle because the decision below could not be supported under the majority rule. See *id.* at 296 ("a generic choice-of-law clause, standing alone, is insufficient to support a finding that contracting parties intended to opt out of the FAA's default standards").

Respondent's claim that the decision below properly applied *Mastrobuono*, Opp. 10-12, is a merits argument based upon respondent's view that *Mastrobuono* was a case where certiorari was granted in error, *id.* at 11 n.4, and whose holding thus should be limited to its peculiar facts, *id.* at 6, 11. Courts of appeals in the majority have refused to read *Mastrobuono* so narrowly, see note 2, *infra*, while the decision below did precisely that, Pet. App. 8a-9a. Again, certiorari is warranted to resolve the appropriate scope of *Mastrobuono* (and *Volt*) given the conflicting views expressed by the circuits.

Lastly, respondent is wrong in suggesting that the views of the arbitral panel were properly ignored by the court of appeals. Opp. 21-23. Given the breadth of the arbitral clause, this Court's cases—and those of the courts of appeals—make clear that questions of "contract construction"—here, whether arbitration is governed by the FAA or state law standards—are for the arbitral panel. Or, as *Mastrobuono* explained, the views of the arbitral panel are the only ones "arguably entitled to deference." 514 U.S. at 60 n.4.

In sum, certiorari should be granted.

1. As TIG showed previously, this case implicates a deep conflict on a recurring issue of *federal* law. Pet. 15-22. Respondent dismisses that showing, arguing that this conflict "is overblown and inaccurate" because the "lower courts" have not conflicted based upon "disagreements over *federal* law." Opp. 7. That argument is refuted not only by the cases setting forth the majority rule, but also by the very decision that respondent seeks to defend.

a. TIG has demonstrated, Pet. 3, 15-16, that the majority rule within the circuit courts is exemplified by the Third Circuit's decision in *Roadway*. 257 F.3d at 294. There, through Chief Judge Becker, the *Roadway* court engaged in a thorough and thoughtful analysis of the interplay between the FAA and general choice-of-law provisions, *id.* at 293-96,

adopted a default federal rule, whereby a general choice-of-law provision would not be read to supplant the FAA with state arbitration rules, *id.* at 296-98, and carefully rejected alternative proposals of the sort advocated by respondent and the court below, *id.* at 298-99. Respondent argues that (1) *Roadway* "rests on an interpretation of Pennsylvania law that, by definition, cannot 'conflict' with the decision below," Opp. 14, and (2) TIG's contrary view is based on "a highly selective quotation from the decision," *id.* at 15.

The suggestion that *Roadway* turned on an analysis of state law is demonstrably false. The *Roadway* Court expressly rejected reliance upon state law and instead adopted a federal "default" standard based upon its reading of this Court's decisions and the requirements of the FAA. 257 F.3d at 294, 296-98. Respondent's charge of "highly selective quotation" is best answered, as quoted above, by the core ruling in *Roadway*. See *supra* at 1-2 (quoting *Roadway*, 257 F.3d at 294); *id.* at 297 (highlighting that *Roadway* adopted "default federal standards").

Respondent's argument that *Roadway* stands for the proposition that "whether a choice-of-law provision incorporates state arbitration standards is 'a matter of contract construction,' and contract law 'is mostly state law' that 'varies from state to state'" Opp. 14-15 (quoting *Roadway*, 257 F.3d at 293-94), is specious. The quotations that respondent lifts from *Roadway* appear in a foundational discussion of (1) why parties include choice-of-law provisions in their contracts as a general matter (*i.e.*, because "[c]ontract law is mostly state law, and it varies from state to state") and (2) why general "choice-of-law clauses" "have no applicability to answering" the question "whether the rule of decision is supplied by the laws of State X or by federal law." 257 F.3d at 293. Only by plucking snippets from this introductory discussion and by omitting the core of the court's analysis can respondent attempt to avoid *Roadway*'s

ultimate ruling that "this case is *not* governed by state law—it is governed by federal law." *Id.* at 294.

Respondent fares no better in suggesting that the decision below does not conflict with *Wolsey, Ltd.* v. *Foodmaker, Inc.*, 144 F.3d 1205, 1213 (9th Cir. 1998). Respondent argues that "the asserted 'conflict' between *Wolsey* and the decision below rests entirely on a disagreement about the meaning of California law." Opp. 13. That argument, however, ignores the opinion below, which rejects *Wolsey* not because the Second Circuit disagreed with the Ninth Circuit's view of *California* law, but because the court below concluded that *Wolsey* "relied on its interpretation of *Mastrobuono*" and "did not predict how the California Supreme Court would rule on the question of state law." Pet. App. 9a n.4. Simply put, the decision below rejected the Ninth Circuit's holding because it recognized that *Wolsey* was *applying* federal law rather than state law.[1]

Any possible doubt regarding the Ninth Circuit's *own* view of its law has since been resolved by *Sovak*, 280 F.3d at 1269-70. There, the Ninth Circuit expressly followed the Third Circuit in *Roadway* by holding, as a matter of federal law, that "the strong default presumption is that the FAA, not state law, supplies the rules for arbitration." *Id.* Thereafter, the Fifth Circuit, relying on *Roadway* and *Sovak*, adopted the same default rule, holding that a general choice-of-law provision does "not express the parties' clear intent to depart from the FAA's vacatur standard." *Action Indus.*, 358 F.3d at

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[1] Although *Wolsey* cites state-law cases to reject reliance upon certain extrinsic evidence, 144 F.3d at 1210-11, it is clear that *Wolsey* relied upon *Mastrobuono* rather than state law to conclude that "general choice-of-law clauses do not incorporate state rules that govern the allocation of authority between courts and arbitrators," *id.* at 1211-13. Respondent accuses TIG of inconsistency, Opp. 14 n.6, but ignores that it successfully argued to the Second Circuit, Pet. App. 9a n.4, that "the Ninth Circuit in *Wolsey* was not interpreting California law." Brief of Security Ins. Co. of Hartford at 19, No. 03-7773 (2d Cir. filed Aug. 11, 2003).

343; see also *Smith Barney, Inc.* v. *Critical Health Sys.*, 212 F.3d 858, 861 n.1 (4th Cir. 2000) (ruling that "arbitration contracts must be construed in accordance with federal law"). Contrary to respondent's suggestion, the cases adopting the majority rule cannot be read "as resting on the application of *state* contract law to the choice-of-law provisions," Opp. 15, because they all adopted *Mastrobuono*'s requirement that parties must express a clear intent to opt-out of the FAA's standards, and that a general choice-of-law provision does not suffice to express that intent.[2]

Respondent does not dispute that, in stark contrast, the decision below rejected reliance upon *Mastrobuono* and instead concluded that California law alone governed the court's analysis of the general choice-of-law provision. Pet. App. 9a ("how does California law interpret the choice-of-law provision utilized in this contract"). Similarly, respondent does not dispute that in *Ekstrom*, 68 F.3d at 1393, the court of appeals relied solely on the District of Columbia's choice-of-law rules to conclude that a general choice-of-law provision displaced the FAA's standards. *Id.* at 1395-96. There can be no dispute that this case presents a deep conflict on a recurring federal issue of national significance.

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[2] *E.g.*, *PaineWebber Inc.* v. *Elahi*, 87 F.3d 589, 594 (1st Cir. 1996) (following "principles and analysis set forth in *Mastrobuono*"); *Porter Hayden Co.* v. *Century Indem. Co.*, 136 F.3d 380, 382-84 (4th Cir. 1998) (adopting the "heavy federal presumption in favor of arbitrability"); *Ferro Corp.* v. *Garrison Indus. Inc.*, 142 F.3d 926, 937 (6th Cir. 1998) (reversing lower court for failing "to apply and follow the rationale set forth in *Mastrobuono*"); *Kelley* v. *Michaels*, 59 F.3d 1050, 1055 (10th Cir. 1995) ("The *Mastrobuono* holding compels our conclusion"); *UHC Mgmt. Co.* v. *Computer Scis. Corp.*, 148 F.3d 992, 996 (8th Cir. 1998) (same). Respondent's reliance upon *Mount Diablo Medical Center* v. *Health Net of California, Inc.*, 124 Cal. Rptr. 2d 607 (Cal. Ct. App. 2002), as setting forth "the meaning of California law," Opp. 14, is itself ironic since that decision was based almost entirely upon an analysis of *federal* cases interpreting *Mastrobuono* and *Volt*. *See* 124 Cal. Reptr. 2d at 610-18.

b. As TIG previously showed, this case is an ideal vehicle to resolve this conflict because, if the court below had applied the majority rule, it could not have concluded that California arbitration law governed this dispute. Pet. 20-22.

Respondent seeks to undermine that conclusion, arguing that review should be denied because this case does not involve a "'generic' choice-of-law provision[]." Opp. 18; *id.* at 7. The opinion below wholly refutes that claim. Below, the court of appeals purported to apply cases addressing the scope of choice-of-law provisions that were deemed "generic" because they "'did not mention arbitration.'" Pet. App. 10a (citing *Mount Diablo*). Thus, the court of appeals decided *this* case based upon its view of the law governing the effect of "a generic choice-of-law clause" on the dealings of "sophisticated commercial parties." *Id.*

Indeed, respondent argued to the court of appeals that California had adopted a rule whereby "the law chosen in a *general* choice-of-law clause applies to all . . . aspects of the contractual relationship" and that "[i]n this case the language of the choice of law clause" is "virtually identical to the language" in those cases. Brief of Sec. Ins. Co. of Hartford at 16, 17 (emphasis added). Plaintiff cannot convince the court below that the choice-of-law clause is generic and then oppose further review by arguing conveniently that the same clause has ceased to be "generic." Opp. 18; see *New Hampshire* v. *Maine*, 532 U.S. 742, 749 (2001) (judicial estoppel "'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase'") (quoting *Pegram* v. *Herdrich*, 530 U.S. 211, 227 n.8 (2000)).

As respondent observes, Opp. 18, the Third Circuit ruled that parties can "contract around the default federal standards" by providing, for example, "that any controversy shall be settled by arbitration in accordance with the terms of the Pennsylvania Uniform Arbitration Act," *Roadway*, 257 F.3d at 297 (internal quotation omitted). The choice-of-law

provision here contains no such statement. Further, the observation by the court below that "[i]f the parties intended for only California substantive law to govern, they could easily have made their intentions clearer with a second exclusion for California's arbitration rules" Pet. App. 11a, reverses the "default federal standards" in *Roadway* and conflicts with its rule that "the FAA standards control 'in the absence of contractual intent to the contrary,'" 257 F.3d at 296 (quoting *Mastrobuono*, 514 U.S. at 59).

c. Finally, respondent contends that the decision below "would not give rise to a conflict worthy of this Court's attention." Opp. 18-19. That suggestion ignores the views of the courts below in this case, which recognized the issue presented as "recurring and troubling" Pet. App. 1a, and "a fertile source of debate, with state and federal courts arriving at conclusions far too varied to mention here," *id.* at 18a (footnote omitted) (rejecting "default rule" of *Roadway* and *Sovak*). The conflict among the federal courts of appeals is precisely the sort that warrants final resolution by this Court.

Respondent's assertion that the cases in the majority "rest upon the fact that the state laws sought to be incorporated by the choice-of-law provision would have been preempted if they applied of their own force," Opp. 20, was expressly rejected by the Third Circuit, see *Roadway,* 257 F.3d at 298. There, Judge Becker rejected an approach whereby a court would apply a different presumption when faced with "state arbitration rules that do not 'conflict' with the FAA" because that proposal "would unduly complicate the law," without "effectuating the intent of most contracting parties." *Id.* at 298, 299.

2. Respondent also contends that certiorari should be denied because, in its view, the court below properly applied *Volt* and *Mastrobuono*. Opp. 8-12. That is not a basis for denying review of a circuit conflict arising from those cases, but instead reflects an argument regarding how the conflict generated by *Volt* and *Mastrobuono* should be resolved *after*

certiorari has been granted. A full response to that argument is neither warranted nor possible in the limited space available, but a number of comments warrant a brief reply.

Contrary to respondent's argument, *Volt* did *not* require "this Court to decide whether the inclusion of a choice-of-law provision in an arbitration agreement expressed the parties' intention to be governed by a state rule of arbitration." Opp. 8. Rather, as explained in *Mastrobuono*, the *Volt* Court "did not interpret the contract *de novo*," but "[i]nstead . . . deferred to the California court's construction." 514 U.S. at 60 n.4. *Volt* thus stands for the core proposition that the FAA allows parties to agree "to arbitrate under different rules than those set forth in the Act itself." *Volt Info. Scis., Inc.* v. *Board of Trs.*, 489 U.S. 468, 479 (1989). *Volt*, however, says little regarding whether a general choice-of-law clause reflects that intent.

In contrast, *Mastrobuono* provides significant guidance on this issue under the FAA. The circuit courts applying *Mastrobuono* have refused to limit it to "the particular terms of the contract before the Court." Opp. 6; see note 2, *supra*. Nor should they adopt such a crabbed reading since the *Mastrobuono* Court explained that it granted review to decide a broader question that arose because "the Courts of Appeals ha[d] expressed differing views on whether a contractual choice-of-law provision may preclude an arbitral award of punitive damages that otherwise would be proper" under the FAA. 514 U.S. at 55.[3] Here, as in *Mastrobuono*, TIG seeks

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[3] Respondent implies that the grant of certiorari in *Mastrobuono* was improvident, arguing that the "Court did not grant certiorari" on the issues that ultimately were decided. Opp. 11 n.4. That speculation ignores not only the Court's explanation why certiorari was granted, but also the Petition for Certiorari, which sought resolution of a circuit conflict on whether "the law of a state named in a choice of law provision, rather than the Federal Arbitration Act, governs the arbitrability of a claim . . . ." Petition for Writ of Certiorari at i, *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) (No. 94-18). The alternative federal

review to resolve an equally important conflict regarding whether a choice-of-law clause incorporates state law arbitration rules and renders the FAA inapplicable.

3. Finally, respondent ignores this Court's cases—and the circuit courts—ruling that where parties have agreed to a broad arbitration clause, issues of contract construction should be resolved, at a minimum, with deference to the views of the arbitral panel. See *Mastrobuono*, 514 U.S. at 60 n.4; *see also* Pet. at 26-29 (citing cases).[4]

Respondent is mistaken that this Court cannot consider the arbitral panel's refusal to grant a stay to respondent. Opp. 22. The courts below expressly ruled that their interpretation of the parties' contract would not be constrained by the arbitral panel's prior denial of the stay sought by respondent. Pet. App. 11a, 27a-28a & n.10. Indeed, in *Green Tree Financial Corp.* v. *Bazzle*, a plurality of this Court, *sua sponte*, ordered that the arbitrator (rather than the court) interpret the parties' agreement. 123 S. Ct. 2402, 2408 (2003).

CONCLUSION

For the foregoing reasons, and those in the Petition, the petition for a writ of certiorari should be granted.

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issue that respondent deems "significant," was not presented in the Petition for Certiorari, was identified in a government brief filed *after* certiorari was granted, Opp. 11 n.4, and ultimately was disposed of by the Court in a footnote, 514 U.S. 61 n.6.

[4] *See Bailey* v. *Ameriquest Mortgage Co.*, 346 F.3d 821, 824 (8th Cir. 2003); *Pedcor Mgmt. Co. Welfare Benefit Plan* v. *Nations Personnel of Tex., Inc.*, 343 F.3d 355, 363 (5th Cir. 2003); *Anders* v. *Hometown Mortgage Servs., Inc.*, 346 F.3d 1024, 1032-33 (11th Cir. 2003). Although these decisions do not involve choice-of-law provisions, Opp. 22, they follow cases by this Court involving choice-of-law provisions in this context and make crystal clear that arbitrators presumptively should decide disputes regarding the meaning of a contract.

Respectfully submitted,

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